Supreme Court, U.S.
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No. 99 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JEANNE S. WOODFORD, Acting Warden, California State Prison at San Quentin, *Petitioner*,

v.

FERNANDO EROS CARO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

Whether the standard of *Strickland v. Washington* 466 U.S. 668 (1984) requires reversal of a death sentence because trial counsel did not investigate a mental defense to which he was not alerted by licensed mental state experts whom counsel consulted and called to testify at trial.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 99 -

JEANNE S. WOODFORD, Acting Warden, California State Prison at San Quentin, *Petitioner*,

v.

FERNANDO EROS CARO, *Respondent*.

Jeanne S. Woodford, Acting Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The amended opinion of the Court of Appeals, App. A at 1-25, is reported at 165 F.3d 1223 (9th Cir. 1999). The order of the Court of Appeals denying rehearing and the suggestion for rehearing en banc, App. B at 26-27, is unreported. The order of the District Court granting the State's motion for summary judgment and denying habeas corpus relief, App. C at 28-71, is unreported.

STATEMENT OF JURISDICTION

The order of the Court of Appeals denying a timely petition for rehearing was entered on March 17, 1999. App. B. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On the evening of August 20, 1980, respondent Fernando Caro [hereafter Caro] shot 15 year old Mark Hatcher in the face as Mark and Mary Booher, his 15 year old cousin, rode their bicycles in an orchard near Mark's home in rural Fresno County. Caro then fled in a pickup truck with Mary and the bicycles. Mary's body was found a few miles away in an orange grove on August 25. She had been shot in the head. The bicycles were abandoned in an irrigation canal.

While escaping with Mary, Caro struck another car but failed to stop. The owner of the car and his friend gave chase and Caro eventually pulled over. After allowing the men to approach as he begged them not to hurt him, Caro suddenly displayed his gun and shot the men. Both survived, but one was left functionally blind in one eye.

Caro subsequently hid his truck and altered his facial appearance. The weapon used in the crimes belonged to his girlfriend.

Caro was represented at trial by the Fresno County Public Defender's Office.[1] Counsel had Caro examined by at least four mental health experts. No expert found evidence of organic brain defect or suggested that further tests be conducted. One expert observed that Caro's "mental processes were quite efficient and effectively manifested by him." ER 6D:1447.[2] The same expert later testified that Caro was highly motivated and cooperative during the psychological testing, RT 4906, and described Caro as having "significantly above average intellectual ability." RT 4907.

At trial Caro's guilt defense consisted primarily of exposing discrepancies in the prosecution's case and attacking the sufficiency of the evidence on various counts.[3] The jury convicted Caro of two counts of first degree murder, kidnapping, and two counts of assault with intent to commit murder. They also found true a multiple murder special circumstance, thus making Caro eligible for the death penalty.

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1. The case was eventually tried in Santa Clara County on a change of venue.

2. ER designates portions of the federal habeas corpus record reproduced on appeal pursuant to Circuit Rule 17-1. RT designates references to the state trial transcript. Cir.R. 10-2(b).

3. One of the mental health experts had been retained specifically to assist in development of guilt phase defenses but after interviewing Caro found no mental disorders that could establish a defense. RT 5125, 5130, 5133-5134. Counsel decided not to "raise any guilt phase defense." RT 5125. Many years after trial the same expert, who no longer had any records from the case, nevertheless declared that had he known of the theories posited by posttrial experts he would have found sufficient mental deficiencies to establish a guilt phase defense for Caro.

The penalty phase of Caro's trial was heard, at his request, by a separate jury. In addition to the guilt phase testimony, the prosecution presented evidence of two prior uncharged murders,[4] a prior kidnapping conviction stemming from a forcible kidnap and rape, and two attempts to escape from jail. The prior rape victim testified in the penalty phase.

Caro "introduced extensive background and character evidence" in mitigation. *People v. Caro*, 46 Cal.3d 1035, 1052, 251 Cal.Rptr. 757, 767 (1988). Among the 17 witnesses called by defense counsel were Caro's parents, a brother, childhood and other friends, his high school coach, his ex-wife, his girlfriend, a job supervisor, and a vocational instructor from the state prison where Caro was incarcerated on the earlier kidnapping conviction. The defense also introduced a detailed history of Caro's life through a licensed clinical social worker and testimony from a clinical psychologist who had interviewed and tested Caro. The jury returned a sentence of death. Judgment was pronounced on January 5, 1982.

Caro's convictions and death sentence were affirmed by the California Supreme Court, which also considered two petitions for state habeas corpus relief. In his second state petition, filed in June 1992, Caro presented declarations from new experts who concluded, in part, that he might suffer from organic brain damage which might be tied to exposure to neurotoxic pesticides. The

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4. The jury was instructed that it must unanimously find beyond a reasonable doubt that Caro had committed the uncharged murders before that evidence could be considered as aggravation. In their verdict forms the jurors reported that they did not unanimously find Caro guilty of either murder and presumably followed the instruction not to consider those crimes in determining the appropriate penalty. The California Supreme Court observed that the unanimity instruction was not required by state law, thus providing Caro greater protection in the penalty phase than that to which he was entitled. *People v. Caro*, 46 Cal.3d 1035, 1057, 251 Cal.Rptr. 757, 771 (1988).

conclusions were based on examinations of Caro made ten to twelve years after the murders and without any expert expressly documenting an organic brain defect. These experts did not undertake to explain the relationship, if any, between such toxic exposure and the kidnapping, murders, and attempted murders for which Caro was convicted. Indeed, conspicuous by its absence was any reference in the expert declarations to Caro's crimes. Caro alleged that trial counsel was ineffective for failing to uncover and present evidence pertaining to neurotoxin exposure as mitigation. The claims were denied on the merits by the state supreme court without an evidentiary hearing in September 1993.

Caro then filed a federal habeas corpus petition in November 1993, again alleging *inter alia*, trial counsel was ineffective for not discovering and presenting as mitigation evidence that he allegedly suffered brain damage from neurotoxin exposure. His claim was based entirely on the declarations of his new, posttrial experts.[5] The District Court denied an evidentiary hearing, granted the State's motion for summary judgment, and denied the petition. It found that Caro's attacks on trial counsel were "too vague and ambiguous" to warrant relief. App. C at 46.

On appeal the Ninth Circuit unanimously denied several claims relating to the guilt determination in an unpublished memorandum decision.[6] In its published opinion, the circuit court panel held by a 2-1 vote that

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5. Caro later offered additional expert declarations that were not presented to the state supreme court. These included a psychiatrist who opined on the basis of an examination conducted more than 14 years after the murders that Caro suffered an organic brain disorder in part because he "has positive suck and positive snout responses." ER 7A: 1483.

6. Because that order is entirely separate from and unrelated to the issues presented by this petition, we have not included it in the appendix.

Caro was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel at the penalty trial.

The majority recognized "the sentencing jury was aware that Caro was beaten and suffered head injuries as a child. The jury also knew that Caro worked as a flagger in high school[7] and at an agricultural chemical company as an adult." App. A at 9. The majority also acknowledged that Caro had been examined by four experts prior to trial, but observed that "none of the experts were neurologists or toxicologists and none conducted the neurological testing needed to evaluate the effects that the pesticides and chemicals had on Caro's brain." App. A at 7.

According to the panel majority, Caro's attorney was obligated to conduct an investigation "which will allow a determination of what sort of experts to consult." App. A at 7. Counsel was also obligated to provide the experts with whom he did consult information necessary to "make an accurate evaluation of Caro's neurological system." App. A at 7. The panel complained that Caro's jury did not "have the benefit of expert testimony to explain the ramifications of [his] experiences on Caro's behavior," holding that "[e]xpert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone." App. A at 9. Because trial counsel did not consult with the correct experts and as a result failed to present "every piece of relevant evidence in mitigation," App. A at 10, the majority remanded to the district court for an evidentiary hearing "to determine whether [Caro] suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate will have rendered the

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7. As a "flagger" Caro stood in the fields to indicate where the crop dusters should spray their pesticides. He wore no protective clothing and often came to school smelling of pesticide. App. A at 4. This evidence was known to the sentencing jury.

results of Caro's penalty phase trial unreliable." App. A at 12.

The dissenting panel judge concluded that Caro's trial counsel was entitled to rely upon the advice of the experts with whom he consulted, none of whom found brain damage or suggested the need for additional testing or experts. That new experts, years later, thought more could have been done did not establish deficient performance by counsel at the time of trial. App. A at 17-20. Moreover, the evidence of guilt and other criminal history, which "the majority pointedly avoid[ed] considering," App. A at 21, in light of the mitigation case which was presented, demonstrated that any lapse by counsel could not have been prejudicial. App. A at 20-25.

REASONS FOR GRANTING THE WRIT

Based on its concerns for comity, federalism, and finality, this Court has "found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." *Thompson v. Calderon*, 118 S.Ct. 1489, 1500 (1998). Nowhere are those restraints more appropriate than in reviewing claims of ineffective assistance of counsel. Rarely will the Court see a more complete departure from its precedent than the panel decision in this case.

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding . . . ." *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993). Thus, a state prisoner challenging trial counsel's action must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Judicial scrutiny of counsel's

performance must be highly deferential," *id.* at 689; must conduct an evaluation of counsel's actions "contemporary" with the time of trial, *Fretwell*, *supra* at 372; and must ultimately focus on whether the result of the trial was unreliable or the proceeding was fundamentally unfair. *Id.*. Unfortunately, as the dissenting panel judge noted, the majority in this case did "not take seriously the nature of [its] inquiry." App. A at 15. The Ninth Circuit decision is neither deferential nor contemporary and fails to consider the fundamental fairness of Caro's trial.

The panel majority held that trial counsel was obligated to have Caro examined by specific types of experts; that counsel was required to determine what information was necessary to allow the experts to accurately evaluate Caro; that the reasonableness of counsel's actions at trial are to be determined by reference to posttrial expert opinions; and that counsel was obligated to present particular expert testimony at trial. The panel majority also failed to evaluate any newly alleged mitigation in light of the evidence in aggravation and held that Caro need do no more than prove he suffered brain damage from exposure to neurotoxins to obtain a new penalty trial.

The Ninth Circuit opinion gravely skews the scope of trial counsel's duty to investigate and the consequences of any lapses by counsel. Those issues merits review by this Court.

A. Trial Counsel's Duty To Investigate

This Court emphasized in *Strickland* that "[j]udicial scrutiny of counsel's performance must be highly deferential," 466 U.S. at 689, and must focus on whether counsel's actions were "reasonable considering all the circumstances." *Id.* at 688. Counsel is "strongly presumed" to have rendered proper assistance and to have "made all

significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Counsel's actions must be examined in light of the facts of the case and as of the time counsel acted. *Id.*; *Fretwell*, 506 U.S. at 372 (emphasizing "rule of contemporary assessment").

Trial counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, *supra* at 691. While there is no bright-line rule defining the scope of investigation, an attorney's decision not to pursue a particular line of inquiry must be assessed in light of the circumstances of the case. *Id.* It is not enough to suggest that counsel could have conducted a more thorough investigation. *Burger v. Kemp*, 483 U.S. 776, 794 (1987). Rather, the defendant must demonstrate that the decision to forgo further investigation was unreasonable in light of the record as known to counsel at the time the decision was made. *Strickland*, *supra* at 691; *Burger*, *supra* at 794.

Caro's counsel had him examined by four mental health experts and none identified any organic brain defects or suggested any further tests that should be conducted in light of Caro's exposure to potentially toxic pesticides. Nonetheless, the Ninth Circuit panel majority concluded that trial counsel was required to conduct an investigation sufficient to determine the "correct" experts to consult. The "correct" experts, according to the circuit court, are those whom posttrial experts claim are necessary. App. A at 6 - 7. This conclusion is expressly contrary to the Court's precedent in at least three ways.

First, the circuit court assumed that an expert evaluation is a mandatory component of preparation for the penalty phase of a capital case. No decision of this Court supports such a rule. Indeed, trial counsel in *Strickland* did not request any psychiatric examination of his client, a decision this Court found to be reasonable under the circumstances. 466 U.S. at 699.

Second, this Court has never suggested that an effective investigation requires contact with any specific witnesses, much less particular types of experts. "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington v. Texas*, 441 U.S. 418, 430 (1979). It is entirely reasonable, therefore, for counsel to rely upon the opinions of the experts with whom he does consult to determine what, if any, additional investigation may be necessary. The expert, not the attorney, is expected to know what information is necessary to reach a diagnosis; any other approach would defeat the whole aim of having experts. Indeed, this Court has never held that any right to the assistance of mental health experts allows the defendant to choose any particular psychiatrist or to obtain more than one expert. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

Finally, the Ninth Circuit's reliance on the opinions of posttrial experts ignores the "rule of contemporary assessment." *Fretwell*, 506 U.S. at 372. It is hardly surprising, particularly in capital cases, for defendants to obtain declarations or other allegedly "new" information about the case. *See Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring). The opinions of new experts, or even the "new" opinions of old experts, obtained more than a decade after trial hardly suffice to establish that the decisions made at the time by trial counsel were unreasonable. To so hold, as does the Ninth Circuit in this case, eviscerates the contemporary assessment rule and expands trial counsel's obligation to investigate beyond any reasonable level. Indeed, an investigation can never be complete nor a judgment final so long as one new expert can suggest additional or alternative theories. *See Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (courts must be careful "not to narrow the wide range of conduct" acceptable under the Sixth Amendment).

The State recognizes that this Court does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). This is not, however, merely a case in which "a concededly correct view of the law was incorrectly applied to the facts . . . ." *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). Rather, the Ninth Circuit panel's wholesale departure from this Court's jurisprudence on effective assistance of counsel has resulted in the creation of "a new constitutional rule under the Sixth Amendment." *Morris v. Slappy*, 461 U.S. 1, 14 (1983); *see Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) (a result not dictated by precedent existing when the conviction became final is barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989)). Review is appropriate to prevent the unwarranted and unprecedented expansion of the right to counsel created by the Ninth Circuit panel.

B. The Requirement Of Prejudice

Absent a complete failure to "subject the prosecution's case to meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 659 (1984), a circumstance clearly not applicable to Caro's case, the defendant must "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. When the challenge, as in this case, is to a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. Prejudice must be assessed under the totality of the evidence before the sentencer. *Id.*

Because the "touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding," *Fretwell*, 506 U.S. at 370, it is not enough to focus merely on outcome determination. Rather, a reviewing court must

consider "whether the result of the proceeding was fundamentally unfair or unreliable . . . ." *Id.* at 369-370. To do otherwise could result in a "windfall" to which the defendant was not entitled. *Id.*[8]

Once again the Ninth Circuit panel ignores the applicable precedent. The majority concludes that "every piece of relevant evidence in mitigation was not presented" at trial, App. A at 10, and assumes that alleged "chemical brain poisoning causing aggressive behavior" was the "single most important evidence of mitigation." App. A at 11.[9] Consequently, if Caro can prove at an evidentiary hearing that he suffered brain damage because of exposure to neurotoxic substances, the sentencing phase, according to the circuit court, was presumptively unreliable and Caro is entitled to a new penalty trial. App. A at 11-12.

In reaching this conclusion the majority completely ignored any mention, much less an analysis, of the evidence in aggravation. This included Caro's purposeful stalking of his young victims; his behavior luring the assault victims into a false sense of security before shooting them; his attempts to conceal his truck and alter his appearance after the murders; his prior kidnapping and rape of a young woman; and his multiple escape attempts. The panel also gave no consideration to the 17

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8. This Court granted certiorari on April 5, 1999, in *Williams v. Taylor*, No. 98-8384, in part to consider the meaning of the "windfall" language in *Fretwell*. 1999 WL 148296; *see Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998).

9. The toxic exposure testimony discussed by the Ninth Circuit was undoubtedly relevant mitigating evidence. That it would likely have been admitted had it been offered at trial, of course, does not establish that counsel's failure to discover the evidence demonstrates deficient performance or that its absence from the trial record compels reversal. *See Burger v. Kemp*, 483 U.S. at 789 n. 7. The panel majority betrays no understanding of this principle.

mitigation witnesses from whom the penalty jury did hear, including a psychologist and a clinical social worker who detailed Caro's life history. Given the overwhelming aggravation case and the extensive mitigation which was presented, it is simply impossible to characterize Caro's penalty phase as fundamentally unfair or his death verdict as unreliable simply because one additional expert was not called. A reversal under these circumstances can only be characterized as a "windfall."

The panel decision creates in effect a rule of per se reversal whenever evidence that a federal court views as significant many years after trial was not presented to the jury. That conclusion is wholly at odds with *Strickland*, does not satisfy the narrow test for presumptive unreliability in *Cronic*, and gives little more than lip service to *Fretwell*. Because the evidentiary hearing ordered by the circuit court cannot establish either deficient performance or prejudice, the State should not be put to the time and expense of once again defending its 17 year old judgment.

CONCLUSION

For the reasons stated above certiorari should be granted.

Dated: April 26, 1999.

Respectfully submitted,

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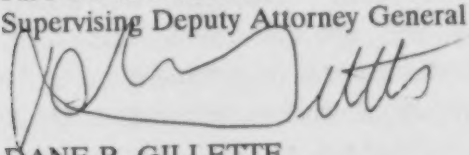

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JEANNE S. WOODFORD, Acting Warden, California State Prison at San Quentin, *Petitioner*

v.

FERNANDO EROS CARO, *Respondent*

CERTIFICATE OF SERVICE BY MAIL

DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 50 Fremont Street, Suite 300, in the City and County of San Francisco, State of California; that on April 28, 1999, he served three true copies of the Petition For Writ Of Certiorari and Appendix To Petition For Writ Of Certiorari in the above-entitled matter on the respondent and by placing same in envelopes addressed as follows:

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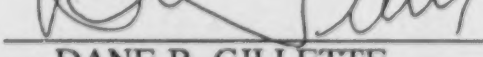
Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO EROS CARO,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
California State Prison at
San Quentin,
Respondent-Appellee.

No. 96-99019

D.C. No. CV-93-04159-JW

ORDER AND AMENDED OPINION
AND AMENDED DISSENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Argued and Submitted
March 5, 1998—Pasadena, California

Filed October 27, 1998
Amended January 11, 1999

Before: Harry Pregerson, Warren J. Ferguson and Andrew J. Kleinfeld, Circuit Judges

COUNSEL

Joseph C. Spero, Coblentz, Cahan, McCabe & Breyer, San Francisco, California, for petitioner-appellant.

Dane R. Gillette, Senior Assistant Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

FERGUSON, Circuit Judge:

Fernando Caro appeals the District Court's dismissal of his writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] In this opinion, we consider whether Caro was entitled to an evidentiary hearing on his claim that counsel's failure to investigate the combined effects of Caro's extraordinary exposure to neurotoxicants, neurological impairments, and personal background constituted ineffective assistance of counsel at the penalty phase trial. We conclude that Caro is entitled to an evidentiary hearing and remand to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Caro was convicted on October 16, 1981, of two counts of first degree murder, the kidnapping of one of the victims, and two counts of assault with intent to commit murder. On December 10, 1981, a sentencing jury returned a verdict of death. On October 6, 1988, the California Supreme Court set aside one of the special

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1. By a memorandum disposition filed this date we have concluded that petitioner is not entitled to habeas corpus relief on the guilt phase issues raised in his petition.

circumstance findings as duplicative, but otherwise affirmed the judgment. People v. Caro, 46 Cal.3d 1035, 251 Cal.Rptr. 757, 761 P.2d 680 (1988). Caro subsequently filed two writs of habeas corpus with the California Supreme Court. The court denied both writs. Caro then filed a writ of habeas corpus in the United States District Court for the Northern District of California. The District Court denied Caro's request for an evidentiary hearing, granted summary judgment for the State, and dismissed the petition.

Caro is of Mexican-American and Yaqui Indian heritage. He was raised in a racially divided rural community in conditions of abject poverty. The oldest son of farm laborers, Caro spent most of his childhood living in a shack surrounded by livestock yards and agricultural fields. The house had no running water or indoor plumbing and, due to its proximity to the livestock yards, was filled with flies and other insects that "made the sky black." During the summer, Caro and his family joined the stream of migrant farm workers. The family slept in fields, open tents, or along the road, sometimes using empty crates as beds. Caro worked alongside the adults as soon as he was able to walk.

Caro's role as the oldest son of a traditional family meant that his parents' expectations of him were higher than those for his siblings. Declarations from his mother, sister, and other relatives all indicate that Caro was the most severely beaten of his brothers and sisters because he was the oldest. Both parents beat Caro severely throughout his childhood, hitting him with closed fists, sticks, belts, tools, and boards, and kicking him with work boots.

Caro suffered severe head injuries as a child. His mother reports that he was born with a three inch lump

on his head due to the use of forceps during his difficult delivery. At the age of three, Caro was struck by a car and fell back and hit his head. A water cooler fell on his head that year as well.

Caro also suffered from acute and chronic exposure to neurotoxic chemicals throughout his life, some of which have been documented to cause otherwise inexplicable aggressive behavior. Caro's family used water laden with pesticides both at home and in the fields for drinking, bathing, and cleaning. His family used insecticide on a daily basis to fight the insect infestation at home. At the age of one and a half, Caro drank a bottle of Clorox and went into convulsions, turning blue and foaming at the mouth, for four to six minutes. Throughout his childhood, Caro worked and played in fields covered with pesticides. One day, while playing on a tank of ammonia, Caro peered into the tank and lost consciousness from the fumes.

During high school, Caro worked as a "flagger" — someone who stands in the fields to indicate to the crop duster where to dump his load of pesticides. Caro was denied the protective clothing his supervisors wore as they watched him mix and load the chemicals prior to dumping. Because he had no access to a shower or time to change clothes before school, Caro would spend all day in pesticide-drenched clothes. The pungent smell of the pesticides earned him the nickname "Stinky" among his classmates.

As an adult, Caro worked for the two years prior to his arrest as a maintenance worker at a corporation that produced toxic pesticides. One of Caro's primary tasks was to clean the air ventilation system and the mixing and heating equipment. Workers were not given protective respiratory devices. Rather, they were tethered with a

rope to a waist belt so they could be pulled out of the system when they lost consciousness. Workers also cleaned contaminated equipment, holding pieces of equipment in vats of solvents with their hands. Plastic protective gloves regularly tore during this work. Caro volunteered to break down five or six transformers containing polychlorinated byphenyls ("PCBs"), formerly banned from use. Caro also formed part of the plant's Emergency Response Team, responding to at least three accidents during his employment. During one of these accidents, the cloud of Parathion that was released burned the paint off the walls.

STANDARD OF REVIEW

The District Court's denial of an evidentiary hearing is reviewed for an abuse of discretion. *Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir.1993) (citing *Greyson v. Kellam*, 937 F.2d 1409, 1412 (9th Cir.1991)).

DISCUSSION

Caro is entitled[2] to an evidentiary hearing if (1) he has alleged facts that, if proved, would entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *See Turner v. Marshall*, 63 F.3d 807, 815 (9th Cir.1995) (quoting *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990)); *see also Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *rev'd on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118

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2. The Anti-Terrorism and Effective Death Penalty Act's amendments to 28 U.S.C. § 2254 do not apply retroactively. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); see also *Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir.1996) (en banc). We therefore apply pre-1996 law.

L.Ed.2d 318 (1992); *Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir.1994).

In order to demonstrate that his counsel was ineffective, Caro must show that his counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Effectiveness must be judged as of the time the legal services were rendered so as to minimize the distortions of hindsight. *Bonin*, 59 F.3d at 835. In addition, Caro must show that the deficient performance rendered the results of his trial unreliable or fundamentally unfair. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *see also Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Failure to investigate a defendant's organic brain damage or other mental impairments may constitute ineffective assistance of counsel. *See, e.g., Hendricks v. Calderon*, 70 F.3d 1032, 1043-44 (9th Cir.1995); *Evans v. Lewis*, 855 F.2d 631, 637-38 (9th Cir. 1988). In addition, this Court has recognized that the failure to present evidence necessary to bridge a cultural gap may constitute ineffective assistance of counsel. *Siripongs*, 35 F.3d at 1316. Counsel have a duty to make a reasonable investigation such that they are able to make informed decisions about how best to represent their clients. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052; *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994). "Thus, we have found counsel ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." *Sanders*, 21 F.3d at 1456.

Caro has presented several declarations from experts stating that no evaluation of his mental capacities is complete without information concerning Caro's exposure to neurotoxicants as well as his personal background.

Caro was examined by four experts prior to trial, including one medical doctor, a psychologist, and a psychiatrist. None of the experts indicated that Caro suffered from a mental impairment severe enough to constitute legal insanity or diminished capacity. Nevertheless, the medical doctor who examined Caro prior to trial has since declared that, had he known of Caro's extraordinary exposure to pesticides, the severe physical, emotional, and psychological abuse he suffered as a child, and his social and cultural history, he would have testified that Caro had a diminished mental capacity. In addition, the competence of the psychiatrist is subject to question, since he prompted a suicide attempt by telling Caro that he should have the right to take his own life. Finally, none of the experts were neurologists or toxicologists and none conducted the neurological testing needed to evaluate the effects that the pesticides and chemicals had on Caro's brain.

Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert. Counsel in this case was aware of Caro's extraordinary acute and chronic exposure to neurotoxicants, and yet he failed to consult either a neurologist or a toxicologist, experts on the effects of the chemical poisoning. In addition, he failed to provide those experts who did examine Caro with the information necessary to make an accurate evaluation of Caro's neurological system.

The conclusion of the dissent is based upon a misunderstanding of the difference in the mental and medical issues discussed in *Williams v. Calderon*, 52 F.3d 1465 (9th Cir.1995), and those presented here. In Williams, referring to the guilt phase of the trial, we stated

that "no psychiatrist would have made a difference." *Id.* at 1470. We have set forth in our memorandum disposition which pertains only to the guilt phase of Caro's trial that the lack of medical evidence discussed in this opinion was not ground for granting the writ in the guilt phase.

However, this case is now about the sentencing phase of Caro's trial and the effect in that phase of Caro's chemically-induced neurological damage. It has been demonstrated that such poisoning causes inexplicable and aggressive behavior. No amount of disdain for the Yale Medical School can change the fact that the jury here was never presented with the most important evidence of mitigation--the chemical poisoning of Caro's brain. Furthermore, the dissent fails to understand the difference between chemical poisoning causing brain damage which results in aggressive behavior and the death of a brain cell caused by the lack of oxygen as the result of a stroke which does not cause aggressive behavior. As the dissent does not understand that difference, then it is clear that a jury must have such a difference explained by experts. It may be the difference between life and death.

It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase. "The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy." *Hendricks*, 70 F.3d at 1044 (quoting *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir.1989), *vacated and remanded on other grounds*, 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991)); *see also Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The government argues that Caro suffered no prejudice during the sentencing phase because the jury

was presented with extensive mitigating evidence, there was overwhelming evidence of Caro's guilt, and aggravating factors weighed against him. The sentencing jury was aware that Caro was beaten and suffered head injuries as a child. The jury also knew that Caro worked as a flagger in high school and at an agricultural chemical company as an adult. The jury did not, however, have the benefit of expert testimony to explain the ramifications of these experiences on Caro's behavior. Expert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone.

In addition, this Court has held that overwhelming evidence of guilt does not ameliorate the failure to present mitigating evidence at the penalty phase. *Hendricks*, 70 F.3d at 1044. "The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors [in California] give the jury broad latitude to consider amorphous human factors, to weigh the worth of one's life against his culpability." *Id.* The type of mitigating evidence omitted here is precisely the type most likely to affect a jury's evaluation of the punishment Caro should receive.

Babbitt v. Calderon, 151 F.3d 1170 (9th Cir.1998), is distinguished from this case. *Babbitt* is a case in which the defendant suffered from post traumatic stress disorder because of his experiences in Vietnam. *Id.* at 1173. At trial, Babbitt presented testimony from two experts concerning his condition. *Id.* Also, at the habeas proceeding in district court, trial counsel stated that he had hired an experienced death penalty investigator who conducted a thorough investigation into Babbitt's history and found every piece of relevant evidence regarding Babbitt's background that could bear in mitigation. *Id.* at 1176. The court held that, with respect to both guilt and

penalty phases, counsel's failure to pursue further evidence that was largely cumulative of the testimony given at the trial was not constitutionally deficient. *Id*. at 1174, 1176.

All that is entirely different from Caro's case. Caro's is not a case of stress caused by a stressful history; rather, it is a case of chemical poisoning of the brain causing aggressive behavior. Unlike Babbitt's case, not a single piece of evidence of Caro's condition was introduced at trial. Counsel, although aware of the acute and chronic exposure to neurotoxic chemicals, did nothing with regard to acquiring experts on the effects of chemical poisoning. In addition, counsel failed to provide those who did examine Caro with the information that he had. All counsel had to do was ask the question "What did all that extraordinary exposure to chemicals do to his brain?" And then, in order to find the answer, he merely had to address the question to either a neurologist or a toxicologist. Similarly, he could have asked the question to the experts he did retain who would have then told him that he needed to consult others.

This cases differs from *Babbitt* where "[t]here was no need for counsel to seek out [additional experts] independently." *Id*. at 1174. It is clear that, contrary to what the dissent believes, *Babbitt* and this case are not based "on materially similar facts," see ante at newly added dissent footnote 1, because every piece of relevant evidence in mitigation was not presented here at trial.

We also held in *Babbitt* that even if there was deficient performance of counsel that the defendant could not show prejudice. *Id*. at 1175-76. In Caro's case, on the issue of prejudice, the dissent does not state that the case for prejudice does not exist, only that it is "weak." *Ante*, at 1177 n. 2. It is submitted that "weak" prejudice is

prejudice nonetheless, particularly when the jury was not presented with the single most important evidence of mitigation--chemical brain poisoning causing aggressive behavior.

Finally, with reference to footnote one in the revised dissent, robust dissent always has been universally recognized as an essential part of the judicial process as it requires judges to focus with particularity upon those matters in the case that divide them. The majority welcomes the intensity of the dissent in this case. However, it is difficult to believe that the dissent would base its test for determining constitutional Sixth Amendment competency of attorneys on its personal unsubstantiated belief in what "good lawyers" often do, rather than on what actually happened in this case.

It must be understood that Caro's brain injuries and poisoning are different from the facts of any other case that has been called to the court's attention. Caro suffered severe head injuries at birth and afterwards. As a child, he drank and bathed in water contaminated with poisons and then, in high school, worked in fields where he was drenched in pesticides. As an adult, he worked in vats filled with toxic pesticides without the benefit of any protective breathing devices. A lawyer who knows of but does not inform his expert witnesses about these essential pieces of information going to the heart of the case for mitigation does not function as "counsel" under the Sixth Amendment, let alone as a "good lawyer." Furthermore, a lawyer whose expert witness advises his client to commit suicide must engage in what the dissent pejoratively labels "witness shopping."

Despite Caro's efforts to obtain an evidentiary hearing on this issue, neither the district court nor the state courts have reliably found the facts relevant to this

claim. Caro is therefore entitled to an evidentiary hearing to determine whether he suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate will have rendered the results of Caro's penalty phase trial unreliable.

The judgment of the district court denying the petition for writ of habeas corpus as it pertains to the sentencing phase of the petition is remanded to the district court for an evidentiary hearing as set forth in this opinion.

REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Today's decision is in conflict with our decision in *Williams v. Calderon*, 52 F.3d 1465 (9th Cir.1995).[1] In

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1. All three of us on the panel missed *Babbitt v. Calderon*, 151 F.3d 1170 (9th Cir.1998). It came down as we were finishing our responses to each others' draft opinions in this case. The petition for rehearing has educated us about Babbitt. We now have a duty either to follow Babbitt or distinguish it.

I think we cannot distinguish it and must follow it. Our decision in *Caro* cannot be reconciled with the earlier decision in *Babbitt*. We are obligated to conform our decision to precedent.

Babbitt and *Caro* reach opposite conclusions on materially similar facts. The defendants in both capital cases claimed ineffective assistance of counsel. In both cases defense counsel consulted with appropriate medical experts. In both, those experts did not refer defense counsel to other experts (in *Babbitt* post-traumatic stress disorder experts and in *Caro* pesticide toxicity brain disorder experts) that habeas counsel argued should have been consulted. In both

cases, habeas counsel claimed that defense counsel at trial should have provided his medical experts with additional information that the experts did not ask for. In both, habeas counsel argued that more should have been brought out about the family circumstances of the defendant. *Babbitt* holds that an evidentiary hearing is not required, *Caro* holds that one is. The factual distinctions drawn by the majority are immaterial.

The relevant principle, applicable equally to both cases, is that where the medical experts counsel retained "did not state that they required the services of additional experts," there "was no need for counsel to seek them out independently." *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir.1998). And *Babbitt* rejects habeas counsel's focus "on what evidence his counsel could have obtained [regarding family and social background] rather than focusing on whether his counsel's investigative efforts were reasonable." *Id.* at 1175.

Good lawyers do not simply read the experts' advertisements in the legal newspapers until they find an expert who will say the right thing, and then use him. An expert who is not believed frequently sinks a case. Good lawyers often consult experts they know and trust, and consider their advice before going further. The majority opinion has the unintended, undesirable consequence of creating a Constitutional requirement that defense lawyers engage in inappropriate witness shopping.

The majority evidently misreads my view on prejudice. As explained below, I think there was none, even if Caro's lawyers' work had fallen below the *Strickland* standard, which it did not.

The majority suggests that I should not be permitted to say what a good lawyer would do, but then opines freely about what, in its opinion, any lawyer functioning as 'counsel' guaranteed by the Sixth Amendment (which is to say, *a fortiori*, any good lawyer) would do. Obviously all of us should and properly do use our experience as lawyers and judges to consider what competent lawyers do and whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The evidence about Caro's chemical exposure was massive, and brought out fully to the jury. Caro's experts had access to it. Dr. Benson employed a clinical social worker who gave him an extensive history of Caro's childhood and adolescence. Dr. Benson now swears that Caro's exposure to pesticides is a "necessary predicate" to

Williams, we affirmed denial of the writ, despite counsel's failure to examine his client's past medical records or seek appointment of an independent psychiatrist, and despite five psychiatrists' declarations submitted with the petition saying that he suffered from diminished capacity when he killed three people after raping one of them. We said that the evidence of Williams' "intent to kill and his ability to maturely and meaningfully reflect on his actions was simply overwhelming." *Id.* at 1470. Likewise here.

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forming a medical opinion. That may show that Dr. Benson did something wrong years ago, when he formed a medical opinion after taking the history he deemed necessary at that time, and did not explore pesticide exposure. It does not show that the lawyer did anything wrong. Nor does the fact that another of the doctors defense counsel used told Caro that in his opinion, people sentenced to death ought to have the option of committing suicide, show that the lawyer did not function as Sixth Amendment "counsel."

That Caro experienced skull trauma and chemical exposure that may cause brain damage, does not prove any link between those factors and Caro's crimes. Aspirin sometimes causes Reyes' syndrome in children, but that does not mean that anyone who has taken aspirin as a child should be assumed to have suffered Reyes' syndrome. If the child did not fall ill with Reyes' syndrome, then it does not matter that he took aspirin. Absence of the consequence makes the potential cause immaterial. One thing may be a medical cause of another in the sense that it increases the probability of the consequence, but the consequence does not happen every time, and if it does not occur in a particular case, then the fact that the predisposing or causal factor was present does not prove anything that matters. Caro's experts did not find evidence of brain damage. So the fact that chemical exposure and skull trauma such as he had sometimes cause brain damage does not matter.

As it stands, I do not think the district courts and the bar can reconcile the majority decision with Babbitt. The majority has not articulated principles on which a distinction can be made. Without some meaningful principle to distinguish the cases, the decision whether a man lives or dies may ultimately not be controlled by neutral principles of law.

A. Deficient performance.

Today's decision does not take seriously the nature of our inquiry. The question is not whether we think Caro's lawyer could have done something more or better than he did. Nor is it whether, in almost two decades since Caro's death penalty was imposed, some lawyer or expert can think of something more that could have been said or done to try to persuade the jury not to impose the death penalty. The question is whether counsel's performance was so deficient that it was as if Caro had no lawyer at all. The answer, plainly, is "no."

The Supreme Court told us how to analyze petitions for habeas corpus asserting ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The majority does not follow the required analytic approach. *Strickland* held that the petitioner had not sufficiently made out a case of ineffective assistance or prejudice. In *Strickland* as here, counsel was accused of failing adequately to develop medical evidence to show mental problems.

Strickland holds that petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. We are required to apply "highly deferential" judicial scrutiny, which requires that "every effort be made to eliminate the distorting effects of hindsight." *Id.* at 689, 104 S.Ct. 2052. The majority does not identify errors of that level of seriousness, does not review counsel's conduct with any deference at all, and applies nothing but hindsight.

The alleged errors of counsel that the majority identifies are (1) failure to investigate Caro's personal background, (2) failure to consult a neurologist or toxicologist, and (3) failure to provide those experts consulted with sufficient information. The record does not establish that counsel fell below *Strickland* standards with respect to any of these.

As to the first issue, Caro's personal background, the majority opinion does not attempt to identify anything that a minimally competent lawyer would have done that Caro's lawyer did not do. The majority mentions Caro's personal background and a physician's claim that his testimony would have been different had the physician known of Caro's "social and cultural history." The majority cites *Siripongs v. Calderon*, 35 F.3d 1308, 1310-13 (9th Cir.1994), for the proposition that "failure to present evidence necessary to bridge a cultural gap may constitute ineffective assistance of counsel." But the majority does not relate these observations to the question of whether counsel in this case rendered ineffective assistance.

Caro's lawyer got both of Caro's parents to testify that they had sorely abused him. He also persuaded Caro's brother, a brother-in-law, a former girlfriend, an ex-wife, a friend from high school, Caro's high school football coach, Caro's boss at work, a vocational instructor from the prison Caro had served time in, a psychologist, and a licensed clinical social worker to testify. They told the jury all about Caro's background, culture, and suffering. They told the jury about how impoverished the family was, and about how Caro suffered from prejudice on account of his Mexican-American Yaqui heritage, and how Caro was called "Stinky" in school because he stunk of pesticides. What does the majority think a minimally competent lawyer would have done to investigate and "bridge a cultural gap" that Caro's lawyer did not do? I

have no idea, because the majority opinion does not say. I also have no idea what Caro's proud heritage has to do with murder.

The meat of the majority opinion is that Caro's lawyer did not do enough to find the right experts and educate them about Caro's background. The opinion errs because it lacks a clear focus on the question: whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Suppose an evidentiary hearing were held, at which the most helpful possible propositions for Caro were proved: (1) that the only reason counsel did not do more was that he did not think of it, and (2) that had counsel done more, he would have found a toxicologist who would testify that pesticide exposure such as Caro had suffered can cause brain damage. That does not add up to a colorable claim of performance below the *Strickland* standard.

Caro's lawyer consulted two psychiatrists, a clinical psychologist, and a licensed clinical social worker, in his diligent attempt to develop evidence of some sort of mitigating mental or emotional condition. The psychiatrists were of course medical doctors. One had, in addition to his M.D., two Ph.D. degrees, in physiology and pharmacology. It is the expert's duty, not the lawyer's, "to recognize what information he needs in order to render an opinion." *Coleman v. Calderon*, 150 F.3d 1105, at 1115 (9th Cir.1998).

The majority accepts Caro's new lawyers' claims that his lawyer at sentencing should have consulted a toxicologist or neurologist. Even if that would have been desirable, it does not establish "errors so serious that counsel was not functioning as the 'counsel' guaranteed

the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. A lawyer defending a criminal case is entitled to rely on a physician to tell him whether another physician in a different specialty is needed. People commonly rely on their own physicians to guide them to the appropriate specialists, in matters of their own life and death. It is the doctor's fault, not the patient's, if the physician does not offer the appropriate guidance.

> [I]n the absence of a specific request, counsel does not have a duty to gather background information which an expert needs. Part of the skill of an expert is to recognize what information he needs in order to render an opinion. To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert.

Coleman v. Calderon, 150 F.3d 1105, at 1115 (9th Cir.1998) (internal citation and quotation omitted). That one of the psychiatrists now says that if he had learned more about Caro, he would have testified differently, reflects badly on the psychiatrist, not on Caro's lawyer. If the doctor needed to know more to form a reliable opinion, he should have asked. The two physicians (one also an expert in pharmacology) did not tell Caro's lawyer to look for evidence of exposure to toxic chemicals or to consult a toxicologist. Evidently they did not think of it, and did not think of asking questions when taking medical histories that would lead them to think of it. So why should a minimally competent lawyer have thought of it?

What Caro's lawyer's experts told him gave him no reason to shop for more evidence on brain damage, mental defect, psychiatric problem, or any other such theory to mitigate punishment. The psychologist, Dr. Leifer, found that Caro was "functioning within the superior range of psychometric ability," with an I.Q. of 124. He found that Caro had "no gross or significantly manifested evidence of psychotic disorganized functioning." Caro went to college, where he performed satisfactorily until his girlfriend broke up with him in his senior year. Then he joined the Marines, where he did so well that he became a commissioned officer, a lieutenant; he was discharged after the rape and kidnapping. Despite a history that could have led to some sort of relevant brain damage, the two psychiatrists and the psychologist who studied Caro did not find any. If these experts could not think of anything else to ask about Caro's history, find brain damage, or think to suggest consulting a toxicologist or neurologist, *a fortiori* Caro's lawyer was not incompetent for failing to do so.

Caro's lawyer made the best of what his experts gave him, by having the psychologist testify that despite his intelligence and apparent normality, Caro had a mental defect which could be a result of child abuse. The defect would cause "sudden lapses where the quality of reality testing is gone under aggressive and demonic themes." Caro's lawyer built on this with massive evidence of child abuse.

A lawyer who sends his defendant to two psychiatrists and a psychologist to try to find some mitigating evidence regarding mental condition has done enough. That years later, a new army of lawyers have found a professor at Yale Medical School who has thought of something more that could have been shown, a theory that exposure to

pesticides might have damaged Caro's brain[2], is entirely irrelevant to the question: whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

B. Prejudice.

The other half of *Strickland* is that the petitioner must "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* Yet a "conceivable effect" is the most that Caro's new lawyers have even arguably suggested. The Court defined the test as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. In *Strickland*, and in *Williams v. Calderon*, 52 F.3d 1465 (9th Cir.1995), despite some additional evidence that might

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2. The majority responds to my dissent by attacking what it calls my "disdain for the Yale Medical School." I have no idea what my reference to Yale Medical School has to do with "disdain." The point is that a lawyer does not have a duty to gain access to and testimony from a professor at one of the most eminent institutions in the country, in order to be minimally competent. Though Caro's lawyer did not scale the walls of Yale, he did consult several other highly qualified experts. They did not refer him to someone more specialized or learned, or advise him that he needed to consult someone else.

Caro's new submissions do not even claim that in December 1981, when the jury returned a verdict of death, the medical literature established that exposure to the chemicals in pesticides may cause brain damage. For all we know from the record, the medical basis for the majority opinion developed in the medical literature during the years that have elapsed since the jury decided this case. If so, no lawyer, however diligent, could have proved then what is claimed now.

have been used to show medical problems, it would have made no difference. Likewise in this case.

The Court instructed us in *Strickland* that we "must consider the totality of evidence before the judge or jury" in determining whether there was a reasonable probability of a different result, but for unprofessional errors. Yet the majority pointedly avoids considering the "totality" of evidence. A reader of the majority opinion cannot even find out what Caro did. But the jury knew. It is our duty to consider the "totality of evidence," not just the evidence generating sympathy for Caro, to decide whether introduction of the new toxicology evidence probably would have changed the jury's collective mind.

At around seven on a summer evening, two teenaged cousins, Mary Booher and Mark Hatcher, went bicycle riding together. Their mother and grandmother went out to meet them a half hour later, and heard a shot. Soon after, they found Mark, shot in the face, dead. Their bicycles were found the next day in a ditch, but Mary had disappeared. She was found five days later in an orange grove, shot in the head, dead and decomposing. Caro had killed the boy, kidnapped the girl, and then killed her too.

After killing the boy and kidnapping the girl, Caro careened away from the scene in his pickup truck, with the bicycles in the bed, and clipped a car in the parking lot of a bar. When he did not stop, the car owner and his friend chased and caught him. Caro got out of his truck and said "don't hurt me," while hiding one hand. One of the men told him they were not going to hurt him, but wanted to know if he had insurance. Caro then exposed his hidden hand with a gun in it, shot that man in the face, and shot the other man in the thigh. Then he approached the first man, who was on the ground, and shot him again, in the chest. Then he chased the other man, who was

fleeing despite his wound, and continued to shoot at him until he ran out of bullets. Miraculously, both men lived and testified. *People v. Caro*, 46 Cal.3d 1035, 251 Cal.Rptr. 757, 761 P.2d 680 (Cal.1988).

Caro hid his pickup truck. He shaved off his mustache. After getting caught, he repeatedly tried to escape. He gave a false alibi. He did not testify at his trial. Bullet fragments from Mark's brain and the wall of a house where the man shot in the thigh had fled, matched Caro's girlfriend's gun, which he had access to at the time. The paint on the car clipped in the bar parking lot matched the paint on Caro's pickup truck. The man shot in the thigh recalled Caro's license plate number almost exactly. Extensive additional evidence made the case irrefutable. A state superior court jury convicted Caro of two counts of first degree murder with use of a firearm, one count of kidnapping with use of a firearm, and two counts of assault with intent to murder with aggravating factors.

The sentencing jury learned of two additional murders that Caro had apparently committed. Two teenaged girls were found dead in an orchard, shot in the head, with a bullet fragment from Caro's girlfriend's gun. The girlfriend could not have done it, because semen was found in the vagina of one of the girls. The jurors had been instructed that they could not consider these murders unless they unanimously found beyond a reasonable doubt that Caro had committed them, and four jurors were not so persuaded, so presumably the jury did not consider them.

A live victim of one of Caro's former crimes also testified, a superior court commissioner. When she was a law clerk six years before, she took a bus to work, but it stopped and discharged all the passengers some miles

away. She tried to hitchhike into work, and Caro picked her up. Once he had her in the car, he pulled a gun and threatened to kill her if she did not do what he said. He kidnapped her, driving her far into the desert. She tried to get away during the four hours he held her by insisting she had to go to the bathroom at a gas station, but Caro came into the ladies' room and forced her out and forced her back into the car. Far from town, he got her out of the car, made her strip naked, and raped her. Eventually she made a daring escape into traffic on a freeway. Caro was caught, pleaded guilty to kidnapping in exchange for dismissal of other charges, and served some time.

In *Strickland* and in *Williams*, with no more horrible facts, it was held that the additional evidence would probably have made no difference to the outcome. Likewise here, Caro could at most demonstrate a "conceivable effect," *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052, not a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694, 104 S.Ct. 2052. The jury knew that he had murdered a teenaged boy and girl who had no relationship to him at all. Then he tried to kill two men who got in his way. This was no aberrational lapse from a pattern of good behavior. Six years before, he had kidnapped a woman for an extended period and raped her. Caro's relentlessness was demonstrated when he pursued his kidnap and rape victim into the ladies' bathroom, and again when he pursued the two men whose car he had hit until he ran out of bullets.

In *Williams*, we said that the evidence "was so clear, lucid and powerful that no psychiatrist would have made a difference." *Williams*, 52 F.3d at 1470. Caro's lawyer put extensive mitigating expert and lay testimony before the sentencing jury. The jury heard 39 witnesses. In the case at bar, it is even more unpersuasive than in *Williams*

to suggest that one more expert would have made a difference. The defense could have put on a toxicologist to say that Caro's exposure to pesticides killed some brain cells. The prosecutor could have put on a physician to say that every stroke victim has suffered death of brain cells yet still ordinarily knows right from wrong and does not shoot people.[3] The jury would have been left with the

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3. The majority claims that my ignorance of medicine disables me from understanding what the majority, without reference to any authority in the record or learned treatises, claims, that brain damage from stroke "does not cause aggressive behavior." Sometimes it does. "Only a few patients become serious *behavior problems* or are psychotic after a stroke, but paranoid trends, ill temper, stubbornness, and peevishness are recognized sequelae." Mohr, Fisher and Adams, Cerebrovascular Diseases 1924, in Harrison's Principles of Internal Medicine (9th ed.1980) (emphasis in original).

Brain damage does not commonly cause murder, so is not necessarily an excuse for murder. Many people suffer destruction of brain cells, from stroke, trauma, toxins, and other causes. Few kill. Even in the unlikely event that a minimally competent lawyer should have found a witness to testify that Caro's exposure to pesticides may have damaged his brain, this record still would not establish prejudice from the absence of such testimony. Proving that pesticides may cause brain damage does not prove that they did, and proving that they did does not prove that Caro should be partially excused for murdering the boy and girl riding their bicycles. A jury would not necessarily assume that anyone with brain damage would, as a result, be compelled by his disorder to kill. Considering all the mitigating evidence that did not persuade the jury to refrain from the death penalty, there is no particular reason to suppose that this additional evidence would have mattered.

It is also significant that, even after almost two decades of post-sentencing litigation, Caro's latest lawyers and doctors have not come up with definitive evidence that he is brain damaged now, or was at the time he killed the boy and girl riding their bicycles. His new experts suggest that he may have been brain damaged, based on what some chemicals in pesticides sometimes can do, clinical impressions, and Caro's own reports of his abnormal feelings and unfortunate history. This is a weak case for prejudice from ineffective assistance. Plenty of people who grew up on farms, constantly exposed to

brutal murder of two young people on bicycles, the relentless attempted murder of getaway witnesses, the kidnapping and rape six years before, and the demonstrated ability to perform at an extraordinarily high level on intelligence tests and in the Marines.

Because Caro has presented no evidence, either of errors by counsel so grave that it is as though he had no lawyer at all in the Sixth Amendment sense, or of prejudice from the errors he claims counsel made, we should follow our own precedent in Williams and affirm.

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pesticides, feel fine, and do not kill anyone. That some of the individuals exposed to certain chemicals may suffer brain damage, which may contribute to disorders of feeling and thought, does not establish that all persons so exposed are free of responsibility for what they do.

Filed March 17, 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FERNANDO EROS CARO,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 96-99019

D.C. No. C-93-4159-JW

ORDER

Before: PREGERSON, FERGUSON, and KLEINFELD, Circuit Judges

Judges Pregerson and Ferguson have voted to deny the petition for rehearing. Judge Pregerson has voted to reject the suggestion for rehearing en banc, and Judge Ferguson so recommends. Judge Kleinfeld hs voted in favor of the petition for rehearing and the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestoin for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

Filed August 19, 1996
Richard W. Wieking, Clerk
U.S. District Court
No. Dist. of CA, S.J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FERNANDO EROS CARO,
Petitioner,

v.

DANIEL VASQUEZ,
Respondent.

No. C 93-4159 JW

ORDER DENYING MOTION FOR EVIDENTIARY HEARING; GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITION FOR WRIT

Charles R. Breyer, Joseph C. Spero, Coblentz, Cahen, McCabe & Breyer, San Francisco, CA.

Joan Killeen, Deputy Attorney General, Office of the State Attorney General, San Francisco, CA.

Lynne S. Coffin, Law Offices of Coffin & Love, San Francisco, CA.

WARE, District Judge.

I. INTRODUCTION

Respondent filed a motion for summary judgment requesting that the Court review the record before it, including all state court proceedings, and grant summary judgment in his favor as to all 35 of Petitioner's claims. Petitioner opposes the motion and contends that he is entitled to an evidentiary hearing with respect to 21 of his 35 claims. Based upon all pleadings filed to date, as well as on a review of the state court record and on the oral argument of counsel, the Court DENIES Petitioner's motion for an evidentiary hearing and GRANTS Respondents' motion for summary judgment. As a result, the Court DENIES Petitioner's petition for a writ of habeas corpus.

II. PROCEDURAL BACKGROUND

Petitioner, Fernando Caro, was sentenced to death on January 5, 1982, following his conviction for the murders of two Fresno County teenagers.[1] The judgment was affirmed by the California Supreme Court on October 6, 1988 and the United States Supreme Court denied certiorari on April 24, 1989. The state court denied a petition for a writ of habeas corpus on September 22, 1988. Petitioner filed a second petition for writ of habeas corpus in the California Supreme Court in June of 1992. That petition was denied in September of 1993. Petitioner then filed this petition in November of 1993. The petition repeats all of the issues presented in the 1992 state habeas proceeding.

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1. Although the murders occurred in Fresno County, Petitioner was tried and convicted in Santa Clara County on a change of venue.

Respondent filed a motion for summary judgment as to all of Petitioner's claims. Respondent argued that some of the claims were procedurally barred, while the remainder of the claims could be resolved by review of the state court record. Due to the complexity of the case and the number of claims involved, the Court phased Respondent's summary judgment motion into two portions: procedural and substantive. On July 11, 1995, the Court issued an order denying Respondent's motion for summary judgment on the basis of procedural bar. The Court held that none of Petitioner's claims were procedurally barred and that all claims were properly before this Court.

The Court now conducts the substantive phase of Respondent's motion for summary judgment and determines whether Petitioner is entitled to an evidentiary hearing on 21 of his 35 claims. With respect to the remaining 14 claims, Petitioner concedes that an evidentiary hearing is not warranted and that the Court may resolve such claims on the record and papers previously submitted. Accordingly, all claims are addressed on the merits below.

III. FACTUAL BACKGROUND

Petitioner was born in 1949 and was the oldest of eight children. His parents were poor farm laborers in rural Imperial County. His family is of both Mexican-American and Yaqui Indian descent. He was raised in a rigid, isolated family and was subjected to severe physical, psychological and emotional abuse and neglect by his father.

While growing up, Petitioner was repeatedly exposed to racial discrimination and tension. He was able, however, to succeed in high school and he attended San

Diego State University. He was active in community service activities and in ROTC. He dropped out of college during his last year and joined the Marines. While in the Marines, Petitioner earned a lieutenant's commission and aviator's wings.

Petitioner later married Rosalyn Duran, whom he had met while in college. The couple had three children, but frequently separated and eventually divorced when Petitioner was in prison serving his sentence for kidnaping. Petitioner was a model inmate at Tehachapi, where he learned air conditioning repair. Paroled in 1978, Petitioner moved to Fresno and met Cathy Lozano, his girlfriend at the time of the murders for which he was convicted.

Petitioner was convicted of the murders of two teenagers from Fresno County, Mary Booher and Mark Hatcher. Booher and Hatcher were 15 year old cousins. On the evening of August 20, 1980, they left Hatcher's home for an after-dinner bike ride. About one half-hour later, Hatcher's mother and grandmother left the home and went to meet the teenagers on their way home from the bike ride. As the women walked, they heard a gunshot from the direction of the orchard behind the house and saw a pickup truck leaving the orchard. The women went to the orchard and found Hatcher's body on a road in the orchard. Hatcher had been shot in the face at a close range. Booher was missing.

The teenagers' bikes were found the next day in an irrigation canal about eight (8) miles from Hatcher's home. Booher's body was discovered on August 25, 1980, in an orange grove a few miles away. Booher had been shot in the head and a later autopsy revealed that she had died within two hours of a meal.

On the evening of August 20, 1980, Rick Donner and Jack Lucchesi were stabbed in the parking lot of a bar at an intersection about two miles from the Hatcher slaying. A pickup truck approached the intersection, driving erratically. The truck entered the parking lot and Donner observed the driver looking down at the seat or floor of the cab. The truck cut across the lot and glanced against Donner's parked car, causing slight damage. The truck did not stop, so Donner and Lucchesi chased it in their own cars.

After about five minutes of chasing, the truck stopped and pulled over. Donner and Lucchesi pulled in behind the truck and got out of their cars. The driver got out of his truck and faced the men, with his left hand hidden inside the cab. Lucchesi walked towards the man, who put up his hand and said "don't hurt me" several times. Lucchesi said no one would hurt him and asked why he hadn't stopped in the parking lot when he hit the car. The man said he was afraid that he would get beat up if he stopped. A bicycle was lying in the bed of the trunk.

Suddenly, the driver's expression changed and Lucchesi stepped back toward the road. The driver withdrew his left hand from the truck and fired a revolver at Lucchesi, hitting him above the right eye and knocking him to the pavement. He then fired two shots at Donner, hitting him in the thigh. He then walked over to Lucchesi and shot him again in the chest. Donner was escaping through the orchard and the driver fired two more shots at him, both of which missed. Donner then heard the gun click empty and turned and saw the driver get back in his truck and drive away. Donner reached a home and summoned for help. Both men survived the shooting, but Lucchesi was left functionally blind in one eye.

Within a few days of the incident, Petitioner's supervisor saw a picture in the paper of the man described by Donner and Lucchesi. The supervisor called the police and told them that the description matched that of Petitioner's and that Petitioner owned an orange Chevrolet side step truck like the one described in the assaults. The supervisor told police that Petitioner had not driven that truck to work since the incident. Based on such information, the police arrested Petitioner at work on August 25, 1980. While Petitioner was being escorted to his locker to change his clothes, he broke free and ran, but was soon captured and taken into custody.

Petitioner waived his *Miranda* rights and denied being involved in either the Booher-Hatch murders or the Donner-Lucchesi assaults. Petitioner said he was home with his girlfriend, Cathy Lozano, on the night of August 20, 1980. He gave police permission to search his truck and the gun owned by Lozano. He said that he got in an accident on August 15, 1980 and that that was when his truck got damaged. However, since the truck matched the description in the newspapers, he decided not to drive it and kept it in the garage. He denied that there had been a bicycle in the back of the truck on August 20, 1980.

The evidence presented at trial established that a bullet fragment removed from Hatcher's brain had been fired from Lozano's gun, as had a bullet recovered from the wall of the house to which Donner fled the night of the assault. Lozano testified that she had been away from August 18, 1980 until about midnight of August 20, 1980 and that she did not have her gun with her during that time. Lozano also testified that two or three hours before she returned home on August 20, she had had a conversation with Petitioner in which Petitioner told her that he had gotten into a hassle with some guys and had had to pull the gun.

In addition, the paint on Donner's car from the collision matched the paint on Petitioner's truck, and tire tracks left near Booher's and Hatcher's bodies were consistent with Petitioner's truck's tires. Donner thought the license number on the truck was "30079N" or "30779N". Petitioner's truck license number was "30997N". Shoe prints near Booher's and Hatcher's bodies matched prints taken from Petitioner's garage, although no shoes were found in Petitioner's possession which could have made the prints.

At Petitioner's request, the trial court conducted separate guilt and penalty phases. At the penalty phase, the trial court permitted the government to introduce evidence regarding two prior uncharged murders implicating Petitioner, a prior kidnaping conviction and two escape attempts.

Petitioner did not testify at either phase. At the guilt phase, Petitioner focused on discrepancies in the prosecution's case and argued the absence of motive for either killing. At the penalty phase, he presented evidence casting doubt on his guilt as to the uncharged murders.[2] He also introduced extensive character background, through testimony by his parents, brother, childhood friends, high school coach, brother-in-law, ex-wife, girlfriend, supervisor and a vocational instructor from the California Correctional Institution at Tehachapi where Petitioner served his prison term for the 1975 kidnaping. Petitioner also presented the testimony of a clinical psychologist and a licensed clinical social worker.

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2. The jury reported, at the end of their deliberations, that they did not unanimously find beyond a reasonable doubt that Petitioner had committed either of the uncharged killings.

Petitioner now contends, through this petition, that he has now, and had at the time of the crimes at issue in this case, organic brain damage. Petitioner contends that his constant exposure to dangerous neurotoxicants, combined with his extensive child abuse and cultural history of discrimination, rendered him incompetent to stand trial. Petitioner argues that none of this information was presented to the guilt phase jury or to the penalty phase jury. Accordingly, Petitioner seeks relief by way of this petition for a writ of habeas corpus.

IV. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. If he meets this burden, the moving party is then entitled to judgment as a matter of law when the non- moving party fails to make a sufficient showing on an essential element of his case with respect to which he bears the burden of proof at trial. *Id.* at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for

summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law ... Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2434-35 (1991) (citing *Anderson*, 477 U.S. at 255); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 588 (1986); *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir.1987). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Service*, 808 F.2d at 631.

B. Evidentiary Hearing Standard

Prior to the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (the "Act"), a federal court was required to conduct an evidentiary hearing in a habeas corpus case where the facts underlying a constitutional claim are in dispute and the habeas petitioner did not receive a full and fair hearing in a state court. *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *Briggs v. Raines*, 652 F.2d 862, 866 (9th Cir.1981). *See* former 28 U.S.C. § 2254(d)(6). Pursuant to former Section 2254(d)(6), a habeas petitioner had to demonstrate that (1) he alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to

establish the truth of his allegations. *Pierce v. Cardwell*, 572 F.2d 1339, 1340-41 (9th Cir.1979).

On April 24, 1996, President Clinton signed the Act which amends Title 153 of 28 U.S.C. and adds Title 154 to 28 U.S.C., which applies to habeas corpus review of state death penalty judgments. Amended § 2254(e)(2) limits the circumstances in which a federal court may hold an evidentiary hearing if the petitioner has not developed the factual basis for a claim in state court. The Act provides in relevant portion:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
> (A) the claim relies on--
>
> (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

V. DISCUSSION

A. Petitioner's Entitlement to an Evidentiary Hearing

As noted above, the passage of the Act limits the circumstances in which a Court reviewing a habeas corpus petition may conduct an evidentiary hearing if a Petitioner has not developed the factual bases for his claims in the state court proceeding. Respondent contends that the Act's provisions apply to the case and that such provisions bar the Court from conducting an evidentiary hearing in this action because Petitioner has not met his burden of proof. Petitioner argues that the Act is not applicable to this action since the Act does not contain a statement as to when the amendments to Title 153 apply.

The Court has previously determined that the Act applies to pending capital cases. *See, Hunter v. Vasquez*, Case No. C-90-3275-JW. For the reasons set forth in the *Hunter* order, the Court finds that the Act is applicable to this action.

However, the Court finds that § 2254(e)(2) does not prevent the Court from conducting an evidentiary hearing in this case. It has not been shown that Petitioner failed to develop the factual bases for the claims he raises in this Court during the state court proceeding. Petitioner raised the claims, requested discovery, funds and an evidentiary hearing and was denied on all requests. Based on such a record, the Court does not find that Petitioner failed to develop the bases for his claims during his state court proceeding.

Having found that newly enacted § 2254(e)(2) applies to this case and does not prevent the Court from conducting an evidentiary hearing, the Court must now

determine whether such a hearing is warranted in this instance. Based on all pleadings filed to date, as well as a review of the state court records, the Court finds that Petitioner is not entitled to an evidentiary hearing on any of his claims. All of the claims may be decided on the pleadings and declarations submitted since there are no underlying factual disputes which must be resolved. The disputes raised by Petitioner's claims are legal disputes which the Court may resolve without the necessity of live testimony through an evidentiary hearing.

"An evidentiary hearing on a habeas corpus petition is required whenever petitioner's allegations, if proved, would entitle him to relief, and no state court trier of fact has, after a full and fair hearing, reliably found the relevant facts." *Turner v. Marshall*, 63 F.3d 807, 815 (9th Cir.1995), quoting, *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir.1990). Although the Court agrees with Petitioner that he has alleged facts which, if proved, would entitle him to relief, he has not shown that an evidentiary hearing is required to establish the truth of his allegations. Rather, the Court finds that all of Petitioner's claims may be determined by review of the pleadings on file and the state court record. Accordingly, each and every claim raised by Petitioner is addressed in Respondent's motion for summary judgment.

B. Respondents' Motion for Summary Judgment

1. Competency Claims 1, 2, 3, 4, 5, 6, 11 and 12

In Petitioner's Claims 1, 2, 3, 4, 5, 6, 11 and 12 he contends that he was not competent to stand trial, to waive his constitutional rights, to assist his trial counsel in his own defense and to form the requisite mental state

necessary to be convicted of capital crimes. In these claims, Petitioner also argues that both his counsel and the trial court should have properly inquired as to his mental competency prior to the commencement of trial. Petitioner also requests an evidentiary hearing as to each of these claims.

Respondent contends that Petitioner is not entitled to an evidentiary hearing on any of these claims and that the claims can be adjudicated by reference to the state court records. Respondent also refers the Court to the case of *Odle v. Calderon*, 919 F.Supp. 1367 (N.D.Cal.1996) in which a district court's denial of a petitioner's request for an evidentiary hearing on the same competency claims as the competency claims raised herein was upheld on appeal. The *Odle* court found that petitioner was not entitled to an evidentiary hearing or to habeas relief on his claims regarding his competency to stand trial.

The test for competency for federal habeas purposes is "whether Petitioner has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960); *Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir.1991). The Court must determine "whether a reasonable judge ... should have experienced doubt with respect to competency to stand trial." *de Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir.1976).

The record before this Court indicates that neither the trial judge, prosecutor or defense counsel ever raised the issue of Petitioner's competency during the trial. While counsel's observations are not necessarily determinative, a defendant's counsel is in the best position to evaluate the client's comprehension of the proceedings.

Hernandez v. Ylst, 930 F.2d 714, 718 (9th Cir.1991). In fact, in a declaration submitted by Petitioner's trial counsel, Mr. Ament, in support of Petitioner's state habeas petition, Mr. Ament noted that at one point during the penalty phase Petitioner "appeared to 'mentally check out.' ". However, Mr. Ament did not move for a competency hearing or raise the issue of Petitioner's competency at any time during the proceedings.

In addition, Petitioner was examined by a total of 4 mental health experts prior to the time of his trial. None of these professionals reached the conclusion that Petitioner was incompetent or was incapable of participating in the trial. Although Petitioner was noted as being suicidal prior to his trial, there is no indication that such suicidal behavior continued once the trial began. Nor does the fact that Petitioner was given medication to help him relax at night support his argument that the trial court should have conducted a competency hearing. Petitioner assured the court that the drug did not affect his ability to reason, understand or exercise his free will. (Reporter's Transcript "RT" 324).

The declarations by Petitioner's new mental health experts are equally unavailing since such declarations are made years after the trial and are not based on personal interviews with Petitioner at the time of his trial. In fact, the Declaration submitted by Dr. Perez-Arce does not make clear whether he has ever spoken with Petitioner at any time. (Exhibit 3 to Petition).

A "trial court must hold a competency hearing if it has or should have a good faith or bona fide doubt about a defendant's competency." *Odle, supra* at 1376. "A bona fide doubt should exist where there is substantial evidence of incompetence." *Id.*, quoting, *Moran v. Godinez*, 57 F.3d 690, 695 (9th Cir.1994).

The competency claims raised in the *Odle* case are almost identical to the competency claims raised herein. In fact, one of the *Odle* mental health experts for petitioner, Dr. Merikangas, has also submitted a declaration in this case on behalf of Petitioner Caro. In both cases, Dr. Merikangas opined that petitioners were not competent to stand trial only after interviewing them more than 10 years after their trials.

The *Odle* court points out that, despite the fact that mental health experts years after the trial opine that the convicted was incompetent to stand trial, no one in contact with the petitioner at the time of trial questioned his competency. Odle never exhibited any difficulty understanding the proceedings or communicating with his attorney. He never exhibited any bizarre or suicidal behavior during the trial. In fact, his trial counsel's declaration indicated that petitioner was an extremely cooperative and likeable client.

The facts and claims discussed in *Odle* bear a remarkable resemblance to this case. Just as in *Odle*, Petitioner herein seeks to establish through the declarations of mental health experts hired during the habeas proceeding that Petitioner was not competent to stand trial, to waive his constitutional rights, to assist in his own defense, and to form the requisite mental intent to commit the capital crimes for which he has been convicted. Just as in *Odle*, Petitioner herein also contends that both his trial counsel and the trial court committed constitutional error by failing to investigate his mental competency.

Based on the state court record in this case, the Court concludes that Petitioner is not entitled to an evidentiary hearing or habeas relief on these competency claims. The Court does not find by a preponderance of

the evidence that Petitioner was actually incompetent to stand trial, to waive his constitutional rights and to assist his counsel in the preparation of his defense. For the same reasons as explained in *Odle*, the Court similarly rejects Petitioner's claims that either his trial counsel or the trial court should have investigated his competency at the time of trial.

2. Ineffective Assistance of Counsel Claims 5, 6, 7, 11, 14, 15 and 35

Petitioner contends that both his trial counsel and his appellate counsel rendered ineffective assistance. Petitioner's Claims 5, 6, 7, 11, 14 and 15 allege that his trial counsel rendered ineffective assistance. Petitioner's Claim 35 contends that his appellate counsel rendered ineffective assistance. These claims are discussed separately below.

a. Ineffective Assistance of Trial Counsel

The Court has already discussed Claims 5 and 6 in the context of Petitioner's competency claims. Claims 7, 11, 14 and 15 allege that trial counsel rendered ineffective assistance to Petitioner by failing to investigate Petitioner's exposure to neurotoxic chemicals as well as Petitioner's mental impairments. Petitioner also launches a general attack on trial counsel's performance at the penalty phase, although Petitioner does not point to any specific acts or conduct on the part of trial counsel at this phase.

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). First, the defendant must show that counsel's performance was deficient. This requires

showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. The defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. Judicial scrutiny of counsel's performance must be highly deferential, however, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*, *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994).

Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 688. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

A defendant can make out a claim of ineffective assistance of counsel only by pointing to specific errors made by trial counsel. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Counsel's conduct must be evaluated for purposes of the performance standard of *Strickland* "'as of the time of counsel's conduct.'" *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir.) (quoting *Strickland*, 466 U.S. at 690), *cert. denied*, 115 S.Ct. 513 (1994).

A difference of opinion as to trial tactics does not constitute denial of effective assistance, *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir.), *cert. denied sub. nom.*, *Dondich v. United States*, 454 U.S. 1127 (1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have

been available. *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984).

A claim of negligence in conducting pretrial investigation can form the basis for a claim of ineffective assistance. *United States v. Tucker*, 716 F.2d 576 (9th Cir.1983); *Hines v. Enomoto*, 658 F.2d 667, 676 (9th Cir.1981). Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Sanders*, 21 F.3d at 1457 (failure to investigate leading to uninformed decision not to call witness who had admitted to committing crime not a strategic decision).

In a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. *Strickland*, 466 U.S. at 698. Claims of ineffective assistance therefore require a review of the record.

The majority of Petitioner's claims regarding the alleged ineffectiveness of his trial counsel revolve around the allegation that Petitioner was not competent, either by virtue of mental impairments or through his long-term exposure to neuro-toxic chemicals, to stand trial and be held accountable for the crime of murder. However, based on its review of the entire state court record, the Court finds that the evidence does not support the claims that Petitioner was not competent at the time of his trial. Therefore, the Court does not find that his counsel acted improperly in failing to investigate Petitioner's competency or in failing to present evidence based on such a defense.

Petitioner's final claim regarding ineffective assistance of trial counsel, that counsel was ineffective at the penalty phase, is too vague and ambiguous to satisfy the *Strickland* standard. No specific error is alleged to have been committed by counsel during this phase. Rather, only a general allegation as to counsel's alleged deficiencies at this stage of the trial is provided. The Court finds that such a vague claim is insufficient to warrant habeas relief.

b. Ineffective Assistance of Appellate Counsel

Petitioner's sole claim with respect to his appellate counsel is that, if the Court were to find that an issue was procedurally defaulted since it was not raised by direct appeal, then the Court should also find that appellate counsel rendered ineffective assistance due to such failure. However, the Court previously found that none of Petitioner's claims are procedurally defaulted. Therefore, there is no basis to support Petitioner's Claim 35.

3. Prosecutorial Misconduct Claims 8, 13, 25 and 29

Petitioner also claims that the prosecutor engaged in misconduct during the course of the state court proceeding which resulted in a denial of Petitioner's constitutional rights. Petitioner's Claims 8, 13, 25 and 29 raise the issue of prosecutorial misconduct.

A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Id.* Claims of prosecutorial misconduct are reviewed "'on the merits, examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Johnson v. Sublett*, 63

F.3d 926, 929 (9th Cir.) (citation omitted), *cert. denied*, 116 S.Ct. 582 (1995).

The first factor in determining the prejudicial effects of misconduct is whether the trial court issued a curative instruction. When a curative instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and that no due process violation occurred. *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987).

Other factors which a court may take into account in determining whether misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt; (2) whether the misconduct was isolated or part of an ongoing pattern, *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir.1987); (3) whether the misconduct relates to a critical part of the case; and (4) whether a prosecutor's comment misstates or manipulates the evidence, *see Darden*, 477 U.S. at 182.

In *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1721-22 (1993) the Court held that the appropriate standard on federal habeas corpus review of a state conviction for determining whether a constitutional error of the trial type is harmless is that of *Kotteakos v. United States*, 328 U.S. 750, 776 (1946): whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 113 S.Ct. at 1722. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "'actual prejudice.'" *Id.* If a defendant so requests, the government has an obligation to surrender favorable evidence that is "material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To find that evidence is material, a court must conclude that "there is a reasonable probability that, had the

evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*, *United States v. Bagley*, 473 U.S. 667, 682 (1985).

If the defense does not request such information, the prosecutor must nonetheless turn over any evidence that might create a reasonable doubt that otherwise would not exist. *United States v. Agurs*, 427 U.S. 97, 112-13 (1976) (omission of such evidence must be evaluated in the context of the whole case and violation of due process occurs when a defendant is denied a fair trial; thus, even minor violations may meet the reasonable doubt requirement in a close case). However, where the government discloses all the information necessary for the defense to discover the alleged Brady material on its own, the government is not guilty of suppressing evidence favorable to the defendant. *United States v. Bracy*, 67 F.3d 1421, 1428-29 (9th Cir.1995).

A prosecutor may not express his personal opinion of the seriousness of the defendant's crime before the jury. *United States v. McKoy*, 771 F.2d 1207, 1210-11 (9th Cir.1985) The prosecutor may, however, make comments about the character of one who would commit the crime at issue. *Turner v. Marshall*, 63 F.3d 807, 818 (9th Cir.1995).

Petitioner's Claim 8 alleges prosecutorial misconduct for failure of the prosecution to provide Petitioner with certain discovery and Brady material regarding certain Kern county murders. However, the jury did not reach a verdict regarding these murders and the trial court instructed the jury not to consider such offenses in determining its penalty. The Court assumes that the jury did as it was instructed. *Greer v. Miller*, 483 U.S. 756

(1987). Therefore, the Court finds that Petitioner is not entitled to habeas relief regarding Claim 8.

With respect to Claim 13, Petitioner's allegation that the state withheld and destroyed material evidence bearing on Petitioner's mental state, the Court exhaustively discussed Petitioner's mental state and condition and found that he was competent to stand trial. Petitioner's allegations that he was abused and ridiculed by the jail employees, assuming such allegations are true, do not warrant habeas relief because such abuse did not render Petitioner incompetent to stand trial. Apparently, Petitioner's counsel was unaware of the abuse, nor did Dr. Benson note any such abuse. (See CT 657). Since Petitioner exhibited no signs of incompetency based on such jailhouse abuse, the Court does not find that habeas relief is warranted as to Petitioner's 13th claim.

With respect to Claim 25, the Court finds that the prosecutor's comments were constitutionally permissible and that such comments do not warrant habeas relief.

Petitioner's Claim 29 asserts that the prosecutor's office in Fresno County exhibits racial prejudice against Hispanics and Native Americans. However, in *People v. McPeters*, 2 Cal.4th 1148 (1992), the California Supreme Court found that petitioner had "showed no more than the barest form of apparent disparity" amongst the racial attributes of those persons charges with crimes in Fresno County. In this case, Petitioner simply relies on the McPeters case and does not present empirical data of his own to prove his discrimination claim. The Court does not find that this claim warrants habeas relief.

4. Denial of Psychiatric Assistance Claim 16

Petitioner's Claim 16 contends that the numerous mental health experts who examined him at trial were incompetent. However, the Ninth Circuit has held that such claims are not cognizable in a federal habeas petition. *Harris v. Vasquez*, 949 F.2d 1497, 1517-18 (9th Cir.1990). Therefore, the Court cannot grant Petitioner's claim for relief based on his claim of a denial of competent psychiatric assistance.

5. Competence of State Court Judge: Claim 10

Petitioner's tenth claim for relief alleges that the trial court judge was incompetent to conduct a fair and impartial trial. Petitioner bases his claim for relief on the fact that Judge Schatz, who presided over Petitioner's jury trial, was placed on medical leave while an investigation into his competency was undertaken in January and February of 1992. Petitioner's trial, however, occurred in 1981. Petitioner does not cite a single case which was overturned by the state appellate court on the basis that Judge Schatz was incompetent. There is absolutely no evidence in the record to support such an allegation and the Court does not find that Petitioner is entitled to habeas relief on this claim.

6. Trial Error Claims 17 and 33

Petitioner asserts a multitude of trial errors allegedly committed throughout the course of his trial as well as during the penalty phase. Petitioner's Claims 17 and 33 allege that a host of trial errors, including prosecutorial misconduct, trial court error, ineffective assistance of counsel and jury misconduct, impinged on the jury's full

consideration of mitigation. Petitioner's specific claims are discussed separately below.

(a) Prosecutor's Misconduct

Petitioner contends that the prosecutor improperly limited the jury's consideration of mitigating evidence by making inappropriate comments regarding the weight of the aggravating factors, by disparaging one of Petitioner's expert witnesses, by discounting Petitioner's psychiatric problems, by focusing on other violent crimes committed by Petitioner, by commenting on opportunities that the victims would never have and by misleading the jury into thinking that they could not consider sympathy for Petitioner as a factor in mitigation.

Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate standard of review is the narrow one of due process and not the broad exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Id.* Claims of prosecutorial misconduct are reviewed "'on the merits, examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.) (citation omitted), *cert. denied*, 116 S.Ct. 582 (1995).

The first factor in determining the prejudicial effects of misconduct is whether the trial court issued a curative instruction. When a curative instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and that no due process violation occurred. *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987). In this instance, there was no objection to any of the comments

made by the prosecutor at trial. Therefore, the trial court was not asked to give, and did not give, any curative instructions.

Other factors which a court may take into account in determining whether misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt; (2) whether the misconduct was isolated or part of an ongoing pattern, *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir.1987); (3) whether the misconduct relates to a critical part of the case, *Giglio v. United States*, 405 U.S. 150, 154 (1972); and, (4) whether a prosecutor's comment misstates or manipulates the evidence, *see Darden*, 477 U.S. at 182. A prosecutor may label a witness's testimony as lies or fabrication. *Turner v. Marshall*, 63 F.3d 807, 818 (9th Cir.1995).

Reviewing the entire state court record, the Court does not find that any of the prosecutor's comments, taken separately or as a whole, rendered Petitioner's trial "fundamentally unfair." Rather, the comments reflected the prosecutor's "take" on the evidence and the trial court properly instructed the jury regarding the factors it could consider as mitigation. Such factors included the Petitioner's childhood and upbringing, his education and military accomplishments, his conduct while serving his prior prison term, his community service record and any other circumstances relating to his family, including his relationship with his children and former wife. (RT 5247, 5273). Accordingly, the Court does not find that the jury was misled regarding its consideration of mitigating evidence.

(b) Trial Court's Erroneous Actions

Petitioner next contends that the trial court erred by failing to properly instruct the penalty phase jury that it

could consider sympathy and exercise mercy in determining the penalty and by failing to instruct the jury regarding the burden of proof at the penalty phase. Petitioner also contends that the trial court committed prejudicial error by questioning a defense witness in such a manner as to demean Petitioner's defense of childhood abuse and convey the judge's own personal feelings to the jury that Petitioner was not abused as a child.

The Court's review of the state court record does not reveal that the trial judge improperly instructed the jury in this case. Nor does the record reveal that the judge improperly questioned a defense witness. It is generally appropriate for a trial judge to take part where necessary to clarify testimony and assist the jury in understanding the evidence. *United States v. Laurins*, 857 F.2d 529, 537 (9th Cir.1988), *cert. denied*, 492 U.S. 906 (1989).

A claim of judicial misconduct by a state judge in the context of federal habeas review does not simply require that the federal court determine whether the state judge committed judicial misconduct; rather, the question is whether the state judge's behavior "rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir.1995) (citations omitted).

A state judge's conduct must be significantly adverse to a defendant before it violates constitutional requirements of due process and warrants federal intervention. *Id.*, *Garcia v. Warden, Dannemora Correctional Facility*, 795 F.2d 5, 8 (2d Cir.1986). It is not enough that a federal court not approve of a state judge's conduct. Objectionable as the conduct at issue might be, when considered in the context of the trial as a whole it may not be of sufficient gravity to warrant the conclusion

that fundamental fairness was denied. *Duckett*, 67 F.3d 734 at 741 (citations omitted).

In this instance, the Court does not find that the trial judge's actions were significantly adverse to Petitioner such that Petitioner's due process rights were violated. In fact, the overall record shows that Petitioner received a full and fair trial and that the judge properly instructed the jury on all aspects of the law as well as on their role and duties in applying such law.

(c) Petitioner's Counsel's Errors

As a result of the alleged improprieties exercised by the prosecutor and the trial judge discussed herein, Petitioner contends that his trial counsel should have objected and complained and moved for a new trial in order to preserve Petitioner's rights. However, as noted above, the Court does not find that either the prosecutor or the trial judge committed error during the trial. Therefore, trial counsel was not obligated to object to such conduct and cannot be found to have rendered ineffective assistance based upon such inaction. *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir.1994).

(d) Jury's Errors

Similarly, since the Court does not find that the jury was improperly instructed or impermissibly influenced, it does not find that the jury failed to give proper consideration to Petitioner's mitigation evidence.

7. Instructional Error at Penalty Phase: Claim 18

Petitioner contends that the trial court improperly instructed the penalty phase jury by informing them that

they could use the special circumstance of multiple murder as two aggravating factors, thus artificially inflating the aggravating factors and pushing the jury towards a sentence of death. This instruction, however, has been found to comport with the Constitution and cannot form the basis for habeas relief. *Bonin v. Vasquez*, 794 F.Supp. 957, 981-82 (9th Cir.1992).

8. Improper Admission of Evidence During Penalty Phase: Claim 19

Petitioner next contends that the trial court erroneously permitted evidence of Petitioner's non-violent flight from police officers when they came to arrest him for the murders to be admitted to the penalty phase jury. Petitioner argues that such evidence is irrelevant and inadmissible at the penalty phase because guilt is not an issue. Petitioner further argues that the admission of such evidence was extremely prejudicial since a separate penalty phase jury was empaneled and such evidence tended to impermissibly infer that Petitioner could be a future danger to the community.

The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir.1995). Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir.1991). Based upon its review of the entire proceedings, the Court cannot say that the admission of Petitioner's flight was so prejudicial that it rendered the entire penalty phase fundamentally unfair.

9. Petitioner's Mental Impairments Not Disclosed to Juries: Claim 20

Petitioner contends that his constitutional rights were violated because neither the guilt phase nor the penalty phase juries ever learned of Petitioner's multiple mental illnesses and his exposure to toxic chemicals. The record reveals, however, that the jury heard testimony regarding Petitioner's exposure to pesticides through the testimony of Samuel Ortiz. (See RT 4832-4833). In addition, even assuming that the juries had not heard any evidence regarding Petitioner's exposure to pesticides, the expert declarations submitted in support of this claim are insufficient to warrant habeas relief. As discussed above, the declarations are based on examinations and discussions by mental health experts several years after Petitioner's trial. There was no evidence or indication that, at the time of his trial, Petitioner was not competent to stand trial.

10. Evidence/Allegations Improperly Admitted: Claims 21, 22 and 27

In Claims 21, 22 and 27, Petitioner contends that evidence and allegations regarding Petitioner's commission of other crimes was improperly admitted into evidence. In Claim 21, Petitioner contends that evidence regarding his alleged commission of uncharged murders which had occurred in Kern County was improperly admitted. However, the record indicates that the jury was instructed that they could not consider such murders as a factor in aggravation unless they found beyond a reasonable doubt that Petitioner committed such murders. The jury did not so agree. Therefore, this Court must presume that the jurors followed their instructions and did not consider the Kern County murders in their deliberations. *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6 (1983).

With respect to Claim 22, Petitioner alleges that the trial court improperly allowed testimony to be admitted against him from a woman he was convicted of kidnaping in 1975. The victim was permitted to testify that Petitioner attempted to rape her and had used a gun during the episode. Petitioner contends that his constitutional rights were violated by the admission of such testimony. However, federal law permits consideration, for sentencing purposes, of offenses dismissed by the prosecution, so long as the information is deemed reliable. *United States v. Lewis*, 862 F.2d 748, 750 (9th Cir.1988).

Finally, with respect to Claim 27, Petitioner contends that he was not given adequate notice of the prosecutor's intent to use the fact of Petitioners attempted escape from jail prior to the time of trial. However, as the record reflects, Petitioner's escape attempt occurred during the trial and the prosecutor gave notice of his intent to use such escape as soon as he became aware of such incident. (RT 1058-59). Therefore, habeas relief on this claim is not warranted.

11. Preemptory Challenges Denied: Claim 23

Petitioner contends that he was denied the opportunity to exercise all of his preemptory challenges during the selection of his guilt phase jury. During the selection process, 12 jurors were selected after the prosecution used 14 preemptory challenges and the Petitioner used 18. The trial judge decided that 2 alternate jurors should be selected when the trial resumed the following week. The next week, when the court reconvened, 1 of the jurors was excused due to family illness. The trial judge then proposed that the parties select 3 jurors and seat one of them in place of the excused juror. Both parties agreed to this procedure and

3 jurors were selected. During the selection process, the prosecutor exercised 3 preemptory challenges and the Petitioner exercised 2. Once the jury was selected, neither party raised an objection to its composition.

Petitioner now contends that he was denied the right to exercise all of his preemptory challenges by the trial judge's refusal to reopen jury selection after one of the jurors was excused. Such a procedure would have allowed Petitioner to exercise his challenges against any of the initial jurors. Such a procedure was authorized by the California Supreme Court in *In re Mendes*, 23 Cal.3d 847 (1979). Denial of a request by the defendant to exercise unused challenges in such circumstances is reversible error. *People v. Armendariz*, 37 Cal.3d 573 (1984). In this case, Petitioner did not request to reopen the jury selection process, nor was there an objection to the method used to select the remaining juror and the alternates.

Peremptory challenges in and of themselves are not of constitutional dimension. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Nonetheless, the right to exercise peremptory challenges is one of the most important of the rights secured to the accused. *Id.* at 89 (citation omitted). Because peremptory challenges are a creature of statute, it is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. *Id.* As such, the "right" to peremptory challenges is denied or impaired--resulting in a violation of the Fourteenth Amendment right to due process--only if the defendant is arbitrarily deprived of that which state law provides. *Id.*, *see*, e.g., *Bonin v. Vasquez*, 794 F.Supp. 957, 975 (C.D.Cal.1992) (failure of state trial court to grant petitioner additional peremptory challenges not constitutional violation where he received all peremptories entitled to under state law).

In this case, the Court does not find that Petitioner's rights to due process were violated since Petitioner neither requested that he be permitted to exercise additional preemptory challenges and was denied his request nor did he challenge the final composition of the jury selected for the guilt phase. Therefore, even assuming that his counsel was ineffective for failing to request that jury selection be reopened, there has been no showing that Petitioner was prejudiced in any way from the selection method that was agreed to and utilized by the parties.

12. Trial Court's Failure to Advise Petitioner: Claim 31

In a claim similar to his 22nd claim, Petitioner contends that the trial court improperly failed to advise him that the prosecutor could use Petitioner's prior kidnapping conviction as a factor in aggravation. Petitioner apparently believed that by admitting to the prior felony at the beginning of the guilt phase, the jury would not hear information regarding the crime. However, as noted above, such evidence is relevant and admissible as a factor in aggravation. *United States v. Lewis*, 862 F.2d 748, 750 (9th Cir.1988). Therefore, Petitioner's constitutional rights were not violated by the trial court's failure to advise him that such evidence could be used as a factor in aggravation during the penalty phase.

13. Trial Court's Failure to Properly Answer Jury's Question: Claim 32

Petitioner next contends that the trial court improperly responded to a juror's question regarding the meaning of life without the possibility of parole. After the jury was instructed but before they began deliberations, one of the jurors asked the court, "[R]egarding penalty,

life imprisonment without possibility of parole, is that no parole ever? Or, I mean, could he ever come up for parole, as sometimes it happens?" The trial court responded, "[T]he law provides for life imprisonment without possibility of parole. That's the way the statute reads." (RT 5255).

The state appellate court found that the trial court's response was correct under state law. Such a finding is binding on this Court. 28 U.S.C. § 2254(d); *Clemons v. Mississippi*, 494 U.S. 738, 746-47 (1992).

14. Juror Misconduct Claims 28 and 29

In Claims 28 and 29, Petitioner contends that his entire jury trial was tainted by and through the misconduct and racial prejudices and biases of the jurors. Specifically, Petitioner points to the actions of one juror, Mrs. Hankins, who admitted to reading a newspaper article which discussed Petitioner's case and one of the witnesses who testified in the case. Mrs. Hankins was questioned rather extensively regarding this article by the state court judge, however, and no objection to her serving as a juror was made by either party. The article did not reveal any information which had not already been, or would be, admitted at the trial.

A determination by a state court judge that a juror is impartial and able to perform his or her duties is entitled to a presumption of correctness. *Smith v. Phillips*, 455 U.S. 209, 218 (1982). Petitioner does not provide any basis for overcoming this presumption since everything in the article was admissible in the trial. Nor does Petitioner provide any evidentiary support whatsoever for his claim that the jurors were biased or prejudiced against Native Americans. Petitioner's arguments and evidence are directed at Fresno County and fail to address in any

manner Santa Clara County, from which Petitioner's juries were selected. Therefore, habeas relief is not warranted on Petitioner's juror misconduct claims.

15. Impermissible Shackling Claim 26

Petitioner contends that he was improperly and prejudicially shackled in front of the juries in violation of his constitutional rights. Prior to the selection of the guilt phase jury, the sheriff requested that Petitioner be shackled during the trial because he had attempted to escape from jail. Although the trial court noted that Petitioner had not been a problem in any courtroom proceeding, he did find that some type of security measure was appropriate and ordered that Petitioner be fitted with a knee restraint. The trial court found that the restraint was "sufficiently unobtrusive that it would not be prejudicial." (RT 340). Neither Petitioner nor his counsel objected to the use of the knee restraint.

After the return of the guilty verdict and prior to the selection of the penalty jury, the court was advised of another escape attempt by Petitioner and was further advised that Petitioner had been found with two combs welded together and shaped to fit a jail lock. (RT 2922-2923). Based on this information, the sheriff requested that Petitioner be restrained with leg and hand chains. Petitioner's counsel objected to the use of any restraint other than the knee brace.

The trial court concluded that some type of additional security was necessary and ordered that Petitioner wear leg chains and be brought to court before the jury arrived each day. The trial court concluded that such restraint "would not be obvious to the jurors". (RT 2923-2924). The court also admonished Petitioner that it would use additional restraints if required to do so by Petitioner's

conduct. (RT 2924-2926). The court also noted that Petitioner had been well-behaved in court to date. (RT 2926).

Two weeks later, during the selection of the penalty phase jury, the court was advised of another escape attempt by Petitioner. The trial court then decided to handcuff Petitioner's left hand to the chair under the table. Neither Petitioner nor his counsel objected to the use of this handcuff and the trial court noted that he did not believe that the cuff was visible to the jury. (RT 3940).

The Sixth and Fourteenth Amendments assure a defendant in a criminal case the right to be present in the courtroom and to a fair trial. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Illinois v. Allen*, 397 U.S. 337, 338 (1970). The *Illinois v. Allen Court* found that trial judges confronted with disruptive, contumacious and stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of the given case, however, and that three methods to deal with these defendants would be acceptable: (1) binding and gagging; (2) citation for contempt; and (3) removal from the courtroom until the defendant promises to conduct himself properly. *Id.* at 343-44. The Court also found that defendants should not be tried while bound and gagged except as a last resort. *Id.*, *see also id.* at 350 (Brennan, J., concurring) (no action should be taken without notice and fair warning of consequences).

To protect this right to a fair trial, courts have recognized that a defendant has the general right to appear before the jury free of shackles or other restraints. *Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir.1989), *cert. denied*, 495 U.S. 910 (1990). The right to appear without shackles is not absolute, however. *Id.* The trial court has

discretion to use shackles or other security measures when circumstances dictate. *Illinois v. Allen*, 397 U.S. at 343-44; *Loux v. United States*, 389 F.2d 911, 919 (9th Cir.), *cert. denied*, 393 U.S. 867 (1968). But the exercise of this discretion must be channeled: "First the court must be persuaded by compelling circumstances 'that some measure was needed to maintain the security of the courtroom.' Second, the court must 'pursue less restrictive alternatives before imposing physical restraints.'" *Jones v. Meyers*, 899 F.2d 883, 885 (9th Cir.) (quoting Spain, 883 F.2d at 720-21) (citations omitted), *cert. denied*, 498 U.S. 832 (1990). In considering less restrictive alternatives to shackling, the trial court should take in account that "(1) shackles may reverse the presumption of innocence by causing jury prejudice; (2) shackles may impair the defendant's mental faculties; (3) shackles may impede communication between the defendant and his counsel; (4) shackles may detract from the decorum of the judicial proceeding; (5) shackles may cause pain to the defendant." Id. at 885. In other words, the trial court "'must weigh the benefits and [these] burdens of shackling against other possible alternatives.'" *Castillo v. Stainer*, 983 F.2d 145, 147 (9th Cir.1992) (quoting Spain, 883 F.2d at 721) (sic in original), *amended*, 997 F.2d 669 (9th Cir.), *cert. denied*, 114 S.Ct. 609 (1993). The trial court need not "conduct a hearing and make finding before ordering that a defendant be shackled," however. *Jones*, 899 F.2d at 886.

Shackling may be justified as a last resort, in cases of extreme need or in cases urgently demanding that action. *Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir.1985); *Tyars v. Finner*, 709 F.2d 1274, 1284 (9th Cir.1983). Shackling is therefore proper where there is a serious threat of escape or danger to those in and around the courtroom, *see Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir.1994); *Hamilton v. Vasquez*, 882 F.2d 1469, 1471 (9th Cir.1989); *Loux*, 389 F.2d at 919, or where disruption in

the courtroom is likely in the absence of shackles, *see Wilson*, 770 F.2d at 1485; *see also Stewart v. Corbin*, 850 F.2d 492, 497 (9th Cir.1988) (shackling was supported by evidence of prior escapes from immediate physical custody of law enforcement officers, once while handcuffed, and by defendant's disruptive behavior during trial; gagging was supported by evidence that he violated court order not to mention certain subjects in front of the jury; and gagging did not violate right of self-representation, as defendant was protected by appointment of counsel), *cert. denied*, 490 U.S. 1016 (1989). It is improper, however, where a compelling need is not established, less restrictive alternatives are not pursued or where the harms were not assessed. *See Rhoden v. Rowland*, 10 F.3d 1457, 1459 (9th Cir.1993); *see also Tyars v. Finner*, 709 F.2d 1274, 1284 (9th Cir.1983) (shackling defendant in civil commitment proceeding without any demonstration that lesser restraints would have been ineffective or impractical constituted violation of due process).

A trial court's discretion to use shackles is reviewed under an abuse of discretion standard. *Wilson v. McCarthy*, 770 F.2d at 1485. It also raises a mixed question of law and fact requiring a district court to sua sponte review the state court record. *Hamilton v. Vasquez*, 882 F.2d at 1472-73. Even if improper shackling is found, it is not per se unconstitutionally prejudicial. *Illinois v. Allen*, 397 U.S. at 342-44. A claim of unconstitutional shackling is subject to harmless error analysis. *United States v. Olano*, 62 F.3d 1180, 1190 (9th Cir.1995) (must show actual prejudice to establish a constitutional violation); *Castillo v. Stainer*, 997 F.2d at 669 (amending 983 F.2d 145) (same). In order to succeed on a unconstitutional shackling habeas claim, petitioner must show that the shackling "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* (citing *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1714 (1993)).

In deciding whether the trial court's erroneous decision to shackle violated due process, a federal habeas court should "determine whether what [the jurors] saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986). If the jurors never saw the shackles, however, no prejudice can be shown and no habeas relief is available. *Rhoden*, 10 F.3d at 1460; *see Castillo*, 983 F.2d at 149 (no prejudice where waist chain could not be seen by jurors).

In this instance, it is clear that Petitioner's constitutional rights were not violated by the trial court's use of shackles. The trial court clearly attempted to use less restrictive means and warned Petitioner that it would be forced to use additional security measures if his conduct continued to demonstrate such a need. Petitioner attempted to escape from jail 3 times during his trial. Such escape attempts clearly established that Petitioner was a security threat and needed to be restrained in the manner in which he ultimately was restrained. Had Petitioner not repeatedly attempted to escape, there would have been no need to, and it is clear from the record that, the trial court would not have imposed additional restraints beyond the knee brace. Nor has Petitioner shown that such shackling, even if visible to the jury, had a substantial and injurious effect in determining the jury's verdict.

16. Improper Medication Claim 9

Petitioner contends that he was presented in a false light to the jury since the jury was not informed that he was taking psychotropic medication which made him appear sedative and as though he lacked emotion and remorse. As discussed above, however, the record is completely devoid of any indication whatsoever that

Petitioner was not competent in any manner to fully participate and assist in his trial. Neither his counsel nor any of the mental health experts used at trial noted any problems whatsoever due to Petitioner's use of medication during the trial. Petitioner himself assured the trial court that the medication did not affect his ability to understand, reason, or exercise his free will. (RT 324).

The Court has also previously discussed the Declaration of Dr. Merikangas. Although the Declaration concludes that Petitioner may have been rendered incompetent by the tranquilizers that Dr. Merikangas assumes Petitioner was taking during the trial, such a conclusion is based years after the fact of the trial and is not based on Petitioner's mental state at the time of the trial. Therefore, based upon this Declaration, the Court is not persuaded that Petitioner's medication presented him a false and prejudicial light before the jury. *Odle v. Calderon*, 919 F.Supp. 1367, 1378 (N.D.Cal.1996).

17. Improper Hypnotically Enhanced Testimony: Claim 30

Petitioner contends that a witness was improperly permitted to testify after having his memory hypnotically enhanced. On August 20, 1980, the day he was shot, Rick Donner was taken to a hospital for emergency treatment. He was interviewed that same day by a sheriff's deputy. Mr. Donner stated at that time that the license number of his assailant's truck was either "30079N" or "30779N". After interviewing him, police thought that Mr. Donner might remember more if he was hypnotized.

Thereafter, on August 21, 1980, Mr. Donner was allegedly placed under hypnosis by Linda Wilson Lee, a deputy sheriff trained in hypnotic induction. On August 22, 1980, Mr. Donner was again placed under hypnosis,

this time by police hypnotist James Harbottle. This session was audio taped and during this session Mr. Donner remembered that the license number was "307079N". The DMV had no record of such a license number.

Petitioner moved to exclude all of Mr. Donner's testimony prior to trial on the basis that such testimony had been hypnotically enhanced. The trial court held a 2 day hearing on this issue and concluded, after hearing all of the witnesses and reviewing the transcript of their testimony, that Mr. Donner's testimony was admissible on the basis that he had not, in fact, actually been hypnotized.

The California Supreme Court has prohibited the introduction of testimony from a witness who was previously hypnotized. *People v. Shirley*, 31 Cal.3d 18 (1982). However, the Ninth Circuit permits such testimony, *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.1979), and at least two circuits have found no federal constitutional violation where testimony from a previously hypnotized witness was introduced in a state criminal trial. *See, Harker v. My*, 800 F.2d 437 (4th Cir.1986); *Clay v. Vose*, 771 F.2d 1 (1st Cir.1985).

In this instance, the trial court found, after an extensive two-day hearing, that the witness had not actually been hypnotized. The trial court, therefore, permitted the witness to testify. The trial court's finding was affirmed on appeal by the California Supreme Court based on "substantial evidence". Accordingly, this finding is entitled to the presumption of correctness pursuant to 28 U.S.C. § 2254(d) and the Court does not find that Petitioner's constitutional rights were violated by the admission of Mr. Donner's testimony.

18. Constitutionality of Death by Lethal Gas Claim 34

As the parties agree, this claim is governed by the case of *Fierro v. Gomez*, Case No. C-92-1482 MHP, in which Judge Patel found that death by lethal gas constitutes cruel and unusual punishment. Unless that ruling is overturned on appeal, Petitioner shall not be executed by lethal gas.

19. Systematic Exclusion of Hispanics and Native Americans from Jury Panels

In Claim No. 24, Petitioner contends that the prosecutor intentionally and systematically excluded all Hispanics and Native Americans from the jury panels in his trials. A criminal defendant has a constitutional right stemming from the Sixth Amendment to a fair and impartial jury pool composed of a cross section of the community. *Holland v. Illinois*, 493 U.S. 474, 476 (1990); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 148-58 (1968). The fair cross section requirement applies only to the larger jury pool or venire and is not applicable to petit juries. *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986); *Nevius v. Sumner*, 852 F.2d 463, 463 (9th Cir.1988), *cert. denied*, 490 U.S. 1059 (1989). A claim of systematic exclusion of members of a particular ethnic group from a jury panel can make out a violation of equal protection even where the number of members of the group in the relevant population is small. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *Morgan v. United States*, 696 F.2d 1239 (9th Cir.1983). A defendant must (1) establish that the group is a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied," *Castaneda*, 430 U.S. at 494; (2) prove the degree of under representation (*see*, e.g., *Cannady*, 54 F.3d at 548

(no prima facie case absent showing of statistical under representation)), and (3) show that the selection procedure is susceptible to abuse or is not racially neutral. The government may rebut a prima facie equal protection violation by proving the absence of discriminatory intent. *Castaneda*, 430 U.S. at 494- 496; *Esquivel*, 75 F.3d at 550 (most crucial factor is discriminatory intent); *Cannady*, 54 F.3d at 548 (equal protection challenge requires element of discriminatory intent).

The Sixth Amendment's fair cross section requirement does not prevent either side from exercising its peremptory challenges in order to exclude cognizable groups from a jury that is impaneled. The Sixth Amendment requires only an impartial, not a representative, jury. *See Holland v. Illinois*, 493 U.S. 474, 476-80 (1990). There is no violation of the Sixth Amendment right to a jury composed of a fair cross section of the community, for example, when a prosecutor uses his peremptory challenges to exclude blacks. *See Batson v. Kentucky*, 476 U.S. 79, 84 n. 4 (1986); *Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir.1983), *cert. denied*, 464 U.S. 1046 (1984).

The use of peremptory challenges by either the prosecution or defendant to exclude cognizable groups from a petit jury may violate the Equal Protection Clause. *See Georgia v. McCollum*, 505 U.S. 42, 55-56 (1992). The Supreme Court first held that the Equal Protection Clause forbids the challenging of potential jurors solely on account of their race, *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), and later extended this protection to challenges solely based on gender, *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1422-30 (1994); *see United States v. DeGross*, 960 F.2d 1433, 1438-39 (9th Cir.1992) (en banc) (same); *see also United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir.1993) (peremptory challenge against unmarried female

venire persons for fear that they would be attracted to defendant violated defendant's right to equal protection as challenge was gender-based).

Batson permits prompt rulings on objections to peremptory challenges under a three-step process. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race (or gender). *Batson*, 476 U.S. at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral (or gender-neutral) explanation for striking the jurors in question. *Id.* at 97-98. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98. In evaluating the race or gender neutrality explanation, the court must keep in mind that proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. *See Hernandez v. New York*, 500 U.S. 352, 355-62 (1991) (no discriminatory intent where Latino jurors dismissed because of possible difficulty in accepting translator's rendition of Spanish language testimony).

The findings of the trial court on the issue of discriminatory intent are findings of fact entitled to the presumption of correctness in federal habeas review. *Purkett v. Elem*, 115 S.Ct. 1769, 1771 (1995). But a federal district court is not bound by any state court fact findings when such findings are either unsupported in the record or refuted by it. *See Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir.1993) (reversing and remanding denial of writ because there was insufficient support in record that black juror was removed for other than racial reasons), *cert. denied*, 114 S.Ct. 1838 (1994).

In this case, all of the potential jurors which are challenged by Petitioner were excused by the prosecution because of their voiced objections to the death penalty, with the exception of one potential juror. With respect to such juror, Joseph Ramirez, the prosecutor stated that he felt that the juror was too young and inexperienced and had not given much thought to his attitudes. The prosecutor also felt that Mr. Ramirez would not provide a "good mix" with the jury since the remaining jurors were all older. The trial court echoed the prosecutor's concerns regarding Mr. Ramirez's age and found that the prosecutor had stated race-neutral reasons for his exclusion of all of the potentially Hispanic jurors. This finding is entitled to a presumption of correctness since it is supported by the record. 28 U.S.C. § 2254(d); *Purkett v. Elem*, 115 S.Ct. 1769 (1995).

VI. CONCLUSION

For the reasons set forth in this Order, the Court does not find that it is necessary to conduct an evidentiary hearing with respect to any of Petitioner's 35 claims. The claims may all be decided by the Court's review of the state court record. Based on such review, the Court does not find that Petitioner is entitled to habeas relief on any of his 35 claims. Therefore, Respondent's motion for summary judgment on all claims is granted and Petitioner's petition for a writ of habeas corpus is denied.

IT IS SO ORDERED.